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GUIDELINES FOR AUTHORS

Manuscript preparation

Articles should be original contributions, not previously published and should not be under consideration to publish elsewhere. Articles should be between 4 000 and 5 000 words, set at 12 point font, in Book Antiqua, with 1 ½ lines spacing. An abstract of 150–200 words must be included.

Spelling

UK English spelling is preferred; and should conform to the most recent edition of the Concise Oxford English Dictionary.

Footnotes

Footnotes should be avoided and their content must be incorporated into the text. If notes are unavoidable, they must be brief and to the point. Convert them to endnotes.

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Short quotes of less than three lines (under 40 words) should run on as part of your sentence with "double quotation marks" to signal where the quote starts and finishes. The page where the quote comes from must be included.
Long quotes known as block quotes or indented quotes (more than 40 words) should:

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Manuscript submission

Articles submitted to the African Journal of Intellectual Property will be reviewed using the double-blind peer review system. Note that plagiarism checks will be carried out on all articles submitted. To protect the author's identity, do not include the author's name in the main text or as running heads and footers.

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FROM THE MANAGING EDITOR

This issue carries a diverse range of topics from a number of African countries. The topics range from geographical indications, originality and fixation, enforcement of trademark rights to intellectual property integration in public policy.

Warui et al. contend that Kenya, like other African countries, is capable of creating monetary value from origin products similar to those registered with Protected Geographical Indications (PGI) and Protected Denomination of Origin (PDO) which add billions of euros annually to the European agricultural sector. They argue that protecting the Kenyan honeys with GI can improve producer livelihoods while conserving the natural environment.

Oriakhogba posits that although originality and fixation are foundational concepts in copyright law their definitional scope under the Nigerian Copyright Act and the South Africa Copyright Act appears unclear. His article examines the scope and standard of originality and fixation in Nigeria and South Africa while adopting a comparative approach.

The protection of property rights is one of the key functions of any legal system. And that he assertion of rights by right holders in the event of infringement is one of the key roles of the civil courts in Zimbabwe. The study by **Munguma** examines the status of civil trademark law in Zimbabwe with a view to ascertain the extent of its effectiveness.

Jika argues that whereas a well-balanced intellectual Property (IP) policy regime has the potential to help nations better deal with complex social, cultural and economic challenges facing them but for IP to produce the desired results, a particular country's context ought to be taken into consideration when integrating IP in its public policy.

In their article, **Maina and Egelyng** state that sustained growth in Kenya's agricultural sector is the main driver of economic development and that diversification through protecting products using geographical indications (GIs) can increase rural incomes. This study was towards identifying Kenyan origin products that have the potential to be registered as GIs and these included tea, coffee, apple and ngowe mangoes, oranges, avocadoes, pyrethrum, koriema goats, tilapia from Busia, baobab and wild silk.

We hope you enjoy reading this issue of the *African Journal of Intellectual Property*.

Munani Mtetwa

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KENYAN HONEYS WITH POTENTIAL FOR PROTECTION WITH GEOGRAPHICAL INDICATIONS

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Abstract

African countries have the potential for creating monetary value from origin products similar to how origin products registered with Protected Geographical Indications (PGIs) and Protected Denomination of Origin (PDO) add billions of euros annually to the European agricultural sector. Following Kenya´s interest in developing Geographical Indications (GI) products, this study investigated the prospects of protecting three Kenyan honeys namely, West Pokot honey, Baringo honey and Kitui honey with GI. Protecting the honeys with GI can improve producer livelihoods while conserving the natural environment. The study employed different data collection methods including observations, focus group discussions and interviews with various actors in the honey sector and representatives from various organisations supporting the honey value chain. The GI potential of West Pokot honey, Baringo honey and Kitui honey was assessed based on four factors, namely product specificity, collective action, market attractiveness, institutional and organisational support, which are considered in identifying/selecting successful GI products. This study showed that West Pokot honey, Baringo honey and Kitui honey have the potential for protection with GI, based mainly on their specificity (unique characteristics which can be differentiated from honeys produced in other regions). Institutional and organisational support is the major constraint for protecting the three Kenyan honeys with GI.

Keywords

origin products, honey, geographical indications, Kenya

Introduction

Use of Geographical Indications (GI) to protect origin products, i.e. products with unique characteristics attributed to their origin, is increasing globally (Blakeney, Coulet, Mengistie, and Mahop, 2012; Egelyng et al., 2016; Vandecandelaere, Arfini, Belletti, and Marescotti, 2010). GI is an intellectual property right that protects collectively owned products produced in a particular territory (Augustin-Jean, Ilbert, and Saavedra-Rivano, 2012; Hermitte, 2001), where a given quality, reputation or any other characteristic of the good is essentially attributable to its geographical origin. Origin agricultural products and food stuffs protected with GI add 13-15 billions of Euros annually to European agricultural sector (Chever, Renault, Renault, and Romieu, 2012). GI can also be used as a tool to conserve biodiversity (Larson Guerra, 2004; Marie-vivien, Garcia, Kushalappa, and Vaast, 2014; Williamson, 2012). Therefore, GI can be used an economic policy instrument to enhance sustainable development (Izac et al., 2009) especially in rural areas. Developing countries in Africa encounter a challenge of expanding economic opportunities in order to sustain the growing populations. To address this challenge, developing countries can use GI to create additional monetary value from origin products, while addressing environmental pressures.

Kenya's Vision 2030, points out agriculture as one of the key driver for development, including beekeeping, which is seen as a low-entry-barrier business among the different communities living in Kenya (GoK, 2010). Honey is produced in different regions of Kenya and income from its sales is a major source of livelihood, especially to populations in arid and semi-arid areas. Value addition in Kenya´s honey sector and higher incomes among producers are aimed for, through promoting investments and improving honey producers´ market access (GoK, 2009). Advancement of the honey sector in Kenya is however, affected by opportunistic traders who change the quality of honey through adulteration, register origin honeys as their own or misuse the origin label through labelling commodities derived from other areas/countries as origin honeys (Nyaga, 2004). This is detrimental to (i) consumers, who are deceived when buying quality and origin products; (ii) legitimate producers, who are deprived of valuable business and benefits from their products; and (iii) the products whose reputation is damaged. Protecting Kenyan origin honeys with GI can address the identified challenges by protecting producers and products from imitation and fraud. GI will also provide product information to consumers, thereby building their confidence/trust in a product, thus create product demand. Protecting origin honeys with GI therefore offers an opportunity for the smallholder producers of origin honeys and small and medium enterprises to access market and gain from the added value.

Kenya is among the few African countries with some interest to protect origin products with GI. Although Kenya lacks a fully developed and operational GI institutional framework (Blakeney et al., 2012; Egelyng et al., 2016), origin Kenyan products can be protected as collective marks or certification marks under Section 40A (5) of the Kenya Trade Marks Act, CAP 506. This therefore forms an opportunity to identify and protect origin products with GI, with an expectation to positively impact on community livelihoods and biodiversity.

Geographical Indications has been proposed as a strategy to add market value to high quality Kenyan honeys (Blakeney et al., 2012; KIPI, 2009) however, the prospects for protecting Kenyan honeys with GI have not been adequately assessed. Drawing on GI literature and case studies, this study assessed the GI potential of three Kenyan honeys- West Pokot honey, Baringo honey and Kitui honey. The potential to protect the three honeys with GI was evaluated based on four factors, namely- product specificity, collective action, market attractiveness, institutional and organisational support, which are considered in developing/selecting successful GI products. This article contributes to the growing scientific literature on potential GI products in developing countries. The findings of this study will inform development of policies and other interventions to overcome barriers for development of GI products in Kenya.

Factors Determining GI Potential of a Product

Through a review of GI literature and case studies of potential GI products conducted across the world '(Bramley and Biénabe, 2013; Giovannucci, Josling, Kerr, OConnor, and Yeung, 2009; Vandecandelaere et al., 2010; WIPO, 2014), four factors determining GI potential of a product were identified. These factors include;

a) Product specificity- this refers to specific unique product characteristics which can differentiate a product from other similar products in other regions (Bramley and Biénabe, 2013; Coulet and Mahop, 2012; WIPO, 2014). According to Mancini (2013) specificity of an origin product should not be reproduced outside its geographical origin. These characteristics are expected to fulfil consumers´ expectations based on perceptions/opinion formed about a product based on past purchasing and consuming experience.

b) Collective action- this entails cooperation of producers and other relevant stakeholders in production, promotion and marketing of a product (Blakeney et al., 2012; Bramley and Biénabe, 2013). Collective action plays an important role in maintaining collective reputation of a product and its characteristics (Winfree and McCluskey, 2005), thus enhancing product demand.

c) Institutional and organisational support– this support include provision of regulatory frameworks (Giovannucci et al., 2009) as well as enforcement procedures, infrastructural development, provision of finances and

information to facilitate production and marketing of a product. This support can be offered by public institutions or non-governmental organisations (Blakeney et al., 2012).

d) Market attractiveness– this entails demand of a product and its competitiveness in the market, based on its attributes which can be reinforced by the image of the area where a product is derived (Bramley and Biénabe, 2013). Information provided to consumers about the origin of a product is important in promoting a product, thus its attractiveness in the market. Market attractiveness of a product can be enhanced by preserving the image of a region in order to obtain and maintain the origin linked quality (Vandecandelaere et al., 2010).

Product specificity is an important GI requirement which should be linked to the natural environment and human resources/factors within the area of production. Natural environment entails the climatic condition and flora in an area while the human resources /factors involve producer local know-how, history and traditions which affect characteristics of a product. Product attributes arising from one of or both links should result in a preferential reputation and demand of the product (Bramley and Biénabe, 2013; Vandecandelaere et al., 2010) among consumers in different markets, leading to better market access and/or higher prices. Often, there is a need for collective action among producers as well as supporting institutions and organisations to sustain, promote and market the origin specific quality. Finally, a commercialization of a product based on origin linked quality enhance market attractiveness and create an economic room and incentive for producers and other actors to sustain the environment in which the product is produced.

Methodology

This study was conducted in Kenya in the period 2014-2015. Three honeys namely, West Pokot honey, Baringo honey and Kitui honey were selected for this study, among other seven Kenyan honeys through a scoping study. The three honeys are produced in arid and semi-arid areas i.e. areas characterized by low, unreliable and poorly/unevenly distributed rainfall, low elevations, high temperatures and frequent droughts. West Pokot, Baringo and Kitui honeys are produced for sale, consumption as food, medicine and use during traditional ceremonies (e.g. payment of dowry and cleansing rituals). The three honeys are among the main sources of livelihoods for communities in their area of production.

To collect data regarding the potential of the three honeys for protection with GI, focus group discussions, observations and interviews with a number of actors in the honey sector including representatives from various organisations supporting honey value chain were conducted (Table 1). At the national level, six key informant interviews were conducted with representatives from: National

Beekeeping Institute (NBI), Kenya Organic Agricultural Network (KOAN), Kenya Bureau of Standards KEBS), Kenya Industrial Property Institute (KIPI), Kenya Honey Council (KHC) and International Centre of Insect Physiology and Ecology (ICIPE). In each of the three study areas, in-depth interviews were conducted with five honey producers, three processors/marketing agents, three consumers, one representative from Ministry of Agriculture, Livestock and Fisheries (MoALF), one representative from Agricultural Sector Development Support Programme (ASDSP) and one representative from the Ministry of Trade, Industry and Enterprise (MTIE). Additionally, two Focus Group Discussions (FGDs) with producers were held in each study area. Each focus group discussion consisted of 10 people.

Table 1: An overview of interviews conducted and gender proportions of respondents

Category	Respondent/informant	No. of respondents	
		Male	Female
Key informants	Representatives of various organisations supporting honey value chain	13	2
Honey producers	Individuals producing honey	10	5
Processors/traders	Processors/marketing agents	5	4
Honey consumers	Users of honey within a region	3	6
Producer groups (individuals in FGDs)	Producers who are members of a honey group	38	22
Total respondents and proportion		**69 (0.64)**	**39 (0.36)**

To evaluate the GI potential of West Pokot honey, Baringo honey and Kitui honey, some sub-factors (variables) for each of the four GI factors under section 2 were developed (Barjolle and Sylvander, 2002). The level of fulfilment of the GI sub-factors for the three honeys were assessed based on information collected from interviews, focus group discussions and observations. For instance, product specificity was evaluated based on unique honey characteristics that can be differentiated from other honeys and demonstration of the link between product characteristics and natural environment and human resources/ factors in the region of production. Collective action was evaluated in terms of cooperation among producers and other stakeholders as well as collective efforts in honey production and marketing. Institutional and organisational support was evaluated based on access/use of formal and informal rules and other supportive functions (e.g. finances, infrastructure, and extension officers) in governing production and marketing of honeys. Effectiveness of institutions and support by organisations in building local capacities to support value addition and market

development for the honeys was also evaluated. Lastly, market attractiveness was evaluated based on whether the honeys are perceived positively by consumers based on their specificity and image of the area of production. Initiatives undertaken to promote the honey and the region where produced e.g. provision of information to consumers about a product were evaluated.

Fulfilment of the GI sub-factors for West Pokot honey, Baringo honey and Kitui honey was evaluated at three levels (i.e. low, medium and high) and a score of one (1) was assigned to a variable where level of fulfilment was low, two (2) where the level was medium and three (3) where the level was high. An average score for the GI factors for each honey was obtained by summing up the scores of the sub-factors under each GI factor, divided by the number of the sub-factors under each main factor (Barjolle and Sylvander, 2002).

Results and Discussion

Section 4.1 presents the three honey cases- West Pokot honey, Baringo honey and Kitui honey based on information collected through researcher´s own observations, focus group discussions and interviews with actors in the honey sector and representatives from various organisations. Section 4.2 evaluates the four factors of GI potential for the three honeys.

Cases of Kenyan honeys with GI potential

West Pokot honey

Information collected from producers and consumers in West Pokot revealed that West Pokot honey has unique taste, colour, texture and viscosity which is distinct from honeys produced in other regions within Kenya and in the neighbouring country i.e. Uganda. Consumers interviewed said that West Pokot honey has a strong sweet taste and it is sticky to the tongue, a characteristic which the consumers like. The colour of the honey range between light brown to dark brown depending on the season of production. Honey producers interviewed mentioned that the honey has medicinal properties which they have proven through continued use. Honey producers in West Pokot attributed the distinctive characteristics of their honey to vegetation in production areas and the hot weather in the region. Beekeepers in West Pokot have knowledge on bee floral sources, thus they place their hives near these flora for bees to forage on the plants for nectar and pollen. Although the langstroth hives (a particular type of modern hives) have been introduced in West Pokot, hollow tree trunks (traditional log hives) are used by most honey producers in the area. Traditional hives are placed on top of tall trees, thus it is not easy to monitor the hives regularly. Producers therefore use local know-how in determining whether honey is ripe for harvesting.

Three centralised honey centres which were initiated by association of beekeepers from different areas within West Pokot were in existence during the fieldwork. They include; Cabesi, Pokot beekeepers cooperative- Kitelakapel and Kodich honey cooperative societies. Activities undertaken at the centralised honey centres include processing and marketing of West Pokot honey as well as training of honey producers on proper honey production methods. The three honey centres are equipped with honey processing machines, through support by non-governmental organisations and the local government. The three honey processing centres have established honey collection centres within the honey production regions where honey producers deliver their honey. Honey producers who are members of existing producer groups are required to deliver comb honey and a quality check is undertaken where honey with brood, dirt, dead bees and high moisture content is rejected. Honey producers are paid upon delivery of honey. During the honey harvesting seasons, honey producers receive clean food grade honey storage buckets from the centralized honey centres. These buckets are labelled to avoid mixing of honeys harvested from different localities within a region. Collection and transportation of honey from the honey collection centres to the centralised honey centres is organised by management at the processing centres.

Extraction of honey from comb is done through centrifuging and moderate heat is used during processing. Honey received from different regions is processed and packaged separately. Honey processed at the three centralised honey centres in West Pokot is certified by Kenya Bureau of Standards (KEBS), thus a certification mark is included in the honey labels as an indication that the honey meet the required local and national market standards. One honey centre i.e. Cabesi has obtained an organic honey label from organic certification of East Africa (Kilimohai) and EnCert (Kenya). The name ´West Pokot´ which designate the geographical origin of West Pokot honey is included in the labels of honey marketed by three honey centres in the region. West Pokot honey is sold to supermarkets within West Pokot and other urban market centres within Kenya. During the study period, members of Pokot beekeepers cooperative exhibited their honey at the Rwanda international trade fair which was organised by the export promotion council of Kenya.

Furthermore, during the focus group discussions, honey group members explained how informal rules e.g. norms and taboos have been used to in maintaining characteristics of the honey and in conserving bee floral sources in West Pokot. Community elders in West Pokot have developed some informal rules to prohibit activities which alter the quality of honey and also those which cause harm to the environment. Violation of these rules is regarded as a bad omen. For instance, any person who gets involved in honey adulteration and cutting down of trees within communal land has to be cleansed through a traditional ceremony in order to protect his life and that of his family as well as their properties. During the study period, the Ministry of Agriculture, Livestock and

Fisheries in West Pokot in collaboration with the three honey centres were in the process of developing honey value chains in order to improve production and marketing of West Pokot honey.

Baringo honey

Interviews held with Baringo honey producers and consumers revealed that Baringo honey has a unique sweet taste with varying colours (light yellow to dark brown) across honey production seasons. Producers also mentioned that the honey is useful in treating colds, cough, wounds and stomach related problems. Producers associated these characteristics with vegetation types in the natural forests where production of Baringo honey takes place. During the focus group discussions, beekeepers in Baringo mentioned that they have communal land where apiary sites are shared. People living around the apiary sites are obliged to protect the flora within the areas. Honey producers in Baringo use both traditional hives (log hives) and modern hives (langstroth hives and Kenya top bar hives). At the time of the study, plans were underway to modify log hives by placing a queen excluder in the log hive in order to separate honey from brood. Producers who are members of honey groups own communal modern hives and each member of the group is required to participate in hive management.

In Baringo, honey producers have formed honey producer groups where issues of honey production, value addition and marketing are addressed. There were five active honey producer groups located in various areas within Baringo during this study. These producer groups have established honey processing/marketing centres where interaction between honey producers, processers, traders and consumers takes place. The honey groups in Baringo have invested in some equipment to facilitate honey processing and marketing activities. The groups participate in trainings, workshops, exhibitions and exchange visits where they have learnt best practises on honey production, value addition and marketing.

The local government of Baringo has been involved in building capacity of honey producer groups through trainings, infrastructure development and linking groups with relevant service providers e.g. financial institutions and input sources. During fieldwork, the local government of Baringo in collaboration with the Ministry of Agriculture and Livestock were recruiting honey producers into the existing honey groups. Development of honey value chains in order to improve honey production activities in Baringo were ongoing during the study. The local government in collaboration with some non-governmental organisations were spearheading formation of an umbrella honey association in Baringo to enhance collective marketing of Baringo honey.

Honey producers in Baringo process and market their honey collectively at the group level. The honey is sold to wholesale buyers as well as to retail buyers at the region of production and in other regions. Producer/processor groups of Baringo honey have small shops which are located at the processing centres and/or in along roadsides where buyers travelling to different destinations can access. Some

buyers who are not able to buy honey from the honey shops in Baringo place their orders and honey is delivered to them as a parcel. Baringo honey is also sold in some selected supermarkets in Baringo and other urban centres in Kenya. Through initiatives by the export promotion council in Kenya, honey produced by one of the honey producer groups in Baringo was exhibited at Rwanda international trade fair which was held in Rwanda. Producers of Baringo honey are allowed by the relevant authorities to exhibit their honeys at the agricultural trade shows and conferences taking place within and outside Baringo. According to a representative in the Ministry of Trade, Industry and Enterprise, these initiatives have expanded the market for Baringo honey.

Producers of Baringo honey to some extent rely on informal rules in governing the quality of the honey they produce. The honey sold by producer/processor groups in Baringo is certified by the Kenya Bureau of Standards. Producer/processor group in Baringo indicate their group name and/or the name of honey geographical origin i.e. ´Baringo´ on the honey label. Some groups also include the name of the dominant flora in the region (i.e. Acacia sp.) or renowned tourist attraction sites in the area (i.e. Lake Baringo and Lake Bogoria) in the honey labels.

Kitui honey

According to honey producers and consumers interviewed, Kitui honey has a faint to moderate sweet taste, high viscosity and distinctive brown colour. Producers of the honey attribute these characteristics to homogenous vegetation in forests where the hives are placed and the high temperatures in the area of production. Traditional hives (log hives) which were observed hanging on trees dominate most of the beekeeping areas however, a few modern hives (box hives, langstroth hives and Kenya top bar hives) were noted in some apiaries. Honey producers in Kitui know the important bee flora, thus they place their hives in the areas where the food resources required by the bees are available.

Honey producer groups within Kitui have formed an umbrella association to handle honey production, processing and marketing activities. ICIPE, an international non-governmental organisation based in Kenya supported the establishment of a honey processing centre/market place, which is also a honey cooperative known as ´Mwingi honey market place`. The market place was the only functional sales outlet for the honey produced by members of honey groups in Kitui. During the study, the local government of Kitui was establishing and equipping six honey collection/processing centres within Kitui. Mwingi honey market place has some equipment to facilitate processing, packaging and marketing of Kitui honey as well as in biodiversity conservation for sustainable production. The market place brings together over 1800 producers, who are all members of active producer groups in different areas within Kitui. Honey delivered at the market place is checked for quality and separated based on the region of production. Processing of the honey is done through centrifuging. The honey sold at Mwingi honey market place is certified by the Kenya Bureau of

standards, an indication that quality assurance for the honey is undertaken in accordance with the existing local honey standards.

The honey sold at Mwingi market place is also certified organic by the institute of Market Ecology in Switzerland with support from ICIPE and the Ministry of Agriculture and Livestock in Kenya. According to the chairman of the market place, organic certification of the honey has created reputation and demand for the honey at the local and national level. During fieldwork, buyers travelling to different destinations via Kitui stopped at Mwingi honey market place to purchase honey. Interviews with honey traders revealed that the farmers who deliver their honey at the market sell their honey at higher prices compared to those who sell their honey to middlemen. During focus groups discussions, honey producers who deliver their honey to the market place mentioned that besides the good pay they receive after delivering their honey, they also receive annual bonuses from their honey sales.

Members of Mwingi honey market place advocate for capacity building on proper beekeeping practises in order to improve their honey production. During focus group discussions, producers explained the importance of local rules i.e. taboos and norms in preserving honey quality and in conserving indigenous vegetation. Honey sold at the market place in Kitui is labelled as ` Eco-honey´ followed by the words ´linking forest biodiversity to sustainable livelihoods', and precise information on sources of nectar for the honey. Producers interviewed were aware of the link between honey quality, natural environment and community livelihoods. Producers stated that their understanding on the link between biodiversity and livelihoods has been enhanced through benefits acquired from conservation programmes in the region whose focus in to maintain the quality of honey.

The four GI potential factors for West Pokot, Baringo and Kitui honeys

The three honey case studies described above show strengths and weaknesses for each honey in terms of GI potential. Figure 1 shows scores on the level of fulfilling the four GI potential factors in the case of West Pokot, Baringo and Kitui honeys.

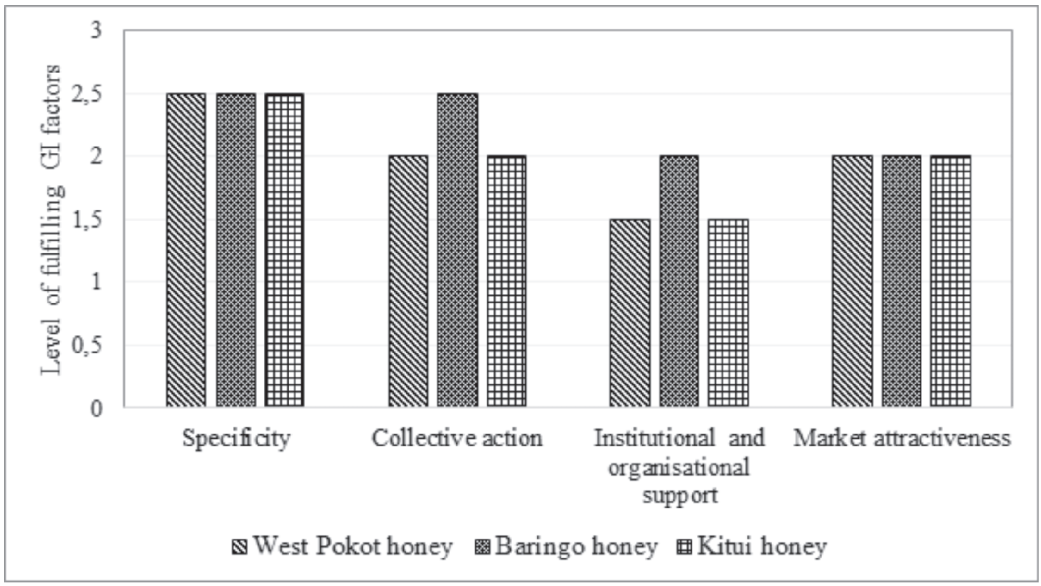

Figure 1: Evaluating the level of fulfilling the four factors of GI potential in the case of West Pokot, Baringo and Kitui honeys (1=low, 2=medium, 3=high)

In the three honey cases, product specificity is the strongest GI factor. In Kenya, West Pokot, Baringo and Kitui regions are known for production of quality honeys. Producer capacity and know-how (Muli, Munguti, and Raina, 2007) as well as vegetation (i.e. the dominant Acacia trees and other indigenous plants) in West Pokot, Baringo and Kitui (Egelyng et al., 2016; Gichora, 2003) contribute to the unique attributes of the three honeys. Oku white honey in Cameroon and PGI/PDO EU honeys in the EU DOOR database were registered based on organoleptic traits and physicochemical properties which are linked to specific floral nectar sources and activities undertaken by producers during production of the honeys (WIPO, 2014). Pollen analysis provided the evidence on floral sources surrounding the apiaries where these honeys were produced while physicochemical analysis revealed the quality of the honeys based on its physicochemical properties. The capacity of honey producers/processors in West Pokot, Baringo and Kitui to demonstrate the link between the natural environment and human factors/resources with honey characteristics however remains a challenge. Construction of some facilities at the local level e.g. laboratories that meet recommended GI standards, where sensory, physicochemical and pollen analysis can be carried out to demonstrate the link is therefore needed. There is also a need to document the honey production processes and other features contributing to characteristics of the three honeys.

In terms of collective action, honey producers in West Pokot, Baringo and Kitui are organised at different levels from beekeeper groups to honey producer associations which bring producers together. Collective processing of the three honeys can enhance consistent honey quality and implementation of quality assurance regulations and product, which is a GI prerequisite. On the other hand,

collective marketing can help meet the market demand through bulk production. Collective reputation of products can result in increased benefits to producers as a result of low transaction costs and economies of scale (Blakeney et al., 2012; Bramley and Biénabe, 2013). There however exists some challenges which would hinder protection of the three honeys with GI. For instance, some honey producers in West Pokot, Baringo and Kitui do not belong to any honey group, thus they work individually despite the existence of honey groups and associations in the three areas. In West Pokot and Kitui, honey producer groups are not fully engaged in collective marketing of their honeys. Also vertical integration of West Pokot and Kitui honey producers with other value chain actors is minimal. This would likely result to information asymmetry and increase in opportunistic behaviour (e.g. free riding and alteration of honey quality) among the value chain actors thereby denying producers the benefits from their potential GI honeys. Additionally, the existing honey producer associations in the study areas do not bring together honey producers from all honey producing areas within a region. Cooperation of producers and other stakeholders as well as collective efforts in marketing of the honeys are therefore needed to facilitate definition of a GI product, conformity to product specification, access to relevant information and promotion of a product (Bramley and Biénabe, 2013). Building capacity of honey producers in the three regions would enhance cooperation and collective efforts among honey value chain actors. Formation of a regional honey association which would bring together all honey producers from all locations within a particular region would also be needed to drive forward the processes required in development and registration of GI honeys.

Institutional and organisational support is the weakest GI factor, thus it presents some constrain in protecting West Pokot, Baringo and Kitui honeys with GI. Existing formal honey standards e.g. East African Standards for honey and Codex Alimentarius have not been implemented by all processors/traders of West Pokot, Baringo and Kitui honeys. Instead, honey producers and processors/traders of the three honeys have over relied on informal institutions e.g. norms and taboos in governing honey production activities. Use of informal institution may not be sustainable in marketing the honeys beyond the local level as well as in their protection with GI which require a wider recognition (Egelyng et al., 2016). Other formal institutions which would govern production and marketing of origin honeys in Kenya are still in the process of development and enactment. These include the Beekeeping Industry Bill, National Beekeeping Policy and GI Bill. Enactment of these institutions would facilitate protection of the honeys with GI, as they would enhance traceability, conformity of a product to GI specifications and registration of the honeys. During this study, production and marketing of West Pokot, Baringo and Kitui honeys received inadequate support from government organisations and this has been a hindrance in enhancing a wider recognition of the three honeys. Protection of the three honeys with GI would therefore need regulatory framework, financial, infrastructural development, and policy support. State intervention would be important in enforcement of existing

policies and standards which enhance production of quality honey which meet the market requirements (Barjolle, Boisseaux, and Dufour, 1998). Initiatives by the Ministry of agriculture and Livestock and other actors would be important in supporting enactment and implementation of beekeeping/honey policies and building capacity of honey producers and processors in order to enhance GI development of the three honeys.

Organic certification of West Pokot and Kitui honeys justify the quality of the honeys with reference to environmental quality resulting from honey producers´ efforts in biodiversity conservation. This has resulted to a consumer positive perception about the honey, thus its demand and premium prices. Benefits derived from a product based on environmental quality is expected to create some economic incentives to conserve the natural environment. This view of linking biodiversity conservation to product quality for economic development has been supported in other GI studies (Allaire, 2012; Blakeney et al., 2012; Marie-vivien et al., 2014). Specificity of the three honeys have enhanced their recognition and demand beyond the local market. Indicating the geographical area of production in the honey labels as well as exhibition of the honeys in conferences, agricultural shows and trade fairs has provided information on region of production, thereby contributing to market attractiveness of the three honeys beyond the local level. However, producers/processors of the honey do not provide full and verified information about characteristics (organoleptic, physicochemical properties and pollen composition) of the honey and the region of production. Provision of such information would ensure that consumers are not misled with regards to quality of the honey in relation to its origin.

Results of the three Kenyan honey cases demonstrate that Kenya has an opportunity to benefit from GI potential honeys however, there exists some factors which may hinder GI development of the potential honeys. Similarly, studies conducted on some proposed GI African agricultural products demonstrate challenges which have hindered their protection with GI despite their unique attributes, which can be differentiated from other similar products (Blakeney et al., 2012; Bramley and Biénabe, 2013; Egelyng et al., 2016; Giovannucci et al., 2009). These products include; Shea butter from Benin, Wild forest coffee and Forest pepper from Ethiopia, Okoume wood from Gabon, Cocoa from Ghana, Cotton from Uganda, Rooibos tea from South Africa and Zanzibar cloves. Common factors which hinder protection of these African products with GI include; lack of a fully operational GI legislative and institutional framework, inadequate product information to support GI protection, financial constraints, undocumented product specifications, inadequate infrastructure, lack of producer and consumer awareness on GI protection and its impacts, inadequate market structures and divided interests by stakeholders in relevant sectors (Blakeney et al., 2012). Despite challenges in the African countries, three products i.e. Ziama-Macenta coffee from Guinea, Penja pepper and Oku White Honey from Cameroon have been awarded protection with GI (Egelyng et al., 2016). One of the PGI product i.e. Oku white

honey has brought positive social, environmental and economic changes in its area of production (WIPO, 2014). In the same way, Kenya can achieve its goals on improving community livelihoods and achieving sustainable development (GoK, 2010) by devising strategies to overcome technical, institutional and other challenges hindering protection of origin products with GI.

Conclusion

The honey case studies and evaluation of GI potential of Baringo honey, West Pokot honey and Kitui honey revealed the potential of the three honeys for protection with GI. The honey cases investigated provided useful insights on prospects for Kenya to develop GI products and markets. Investigation of the three honey case studies indicated that activities by honey producers and processors, as well as initiative by other actors in the honey sector, play an important role in enhancing GI potential of the honeys. The case studies presented in this article show specificity (uniqueness of a product based on its origin) as an important factor of GI potential in the case of the three honeys. Unique characteristics of the honeys which are attributed to origin would not only enhance reputation and demand of the products but it would also create additional monetary value which would enhance producer livelihoods, while conserving the natural environment where the honeys are produced. Protection of these honeys with GI would however be made successful through demonstration of the link between product specificity and its geographical origin. Besides product specificity, other factors which may facilitate eventual protection of West Pokot, Baringo, and Kitui honeys with GI include; cooperation of honey producers and other stakeholders in production of the three honeys as well as positive opinion about the honey characteristics based on the image of the region where the three honeys are produced. Capacity building of honey producers and processors at the local level, development, enactment and implementation of institutional frameworks are needed to enhance protection of Baringo, West Pokot and Kitui honeys with GI. The initiative by KIPI in developing and enacting the draft GI Bill in Kenya would be fast-tracked through support from both local and national government in Kenya as well as support from other internal and external organisations.

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THE SCOPE AND STANDARD OF ORIGINALITY AND FIXATION IN NIGERIAN AND SOUTH AFRICAN COPYRIGHT LAW

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Abstract

Originality and fixation are foundational concepts in copyright law. They are stipulated as major conditions for the subsistence of copyright in Nigerian and South African copyright law. However, their definitional scope under the Nigerian Copyright Act and South Africa Copyright Act appears unclear. Thus, aided by relevant judicial authorities, this article aims to examine the scope and standard of originality and fixation in Nigeria and South Africa. To this end, it examines relevant provisions of the Nigerian Copyright Act and South African Copyright Act while adopting a comparative approach. To be effective, the article briefly highlights some international perspectives on the concepts before focusing on the Nigerian and South African situations. Specifically, it draws on developments in select common law countries and civil law countries to throw light on the Nigerian and South African jurisprudence on originality and fixation. In this regard, reliance is placed on relevant statutory provisions, recent judicial authorities and academic literature from Nigeria, South Africa, among others.

Keywords

copyright, originality, fixation, Nigeria, South Africa

Introduction

Originality and fixation are core "threshold standard[s] for qualification for copyright protection" (Abrams, 1992) in Nigeria and South Africa. Originality is a major factor in determining authorship of a work. A person does not become an author merely by copying another person's work (*ICIC (Directory Publishers) Ltd v Ekko Delta (Nig) Ltd* [1977-1989] 2 IPLR 32; *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA)). To be an author and thus entitled to copyright in a work, a person must show that the work is original to him. Where this is lacking, such person cannot exercise the limited exclusive rights, which copyright law affords, over the work. According to (Craig, 2005), "originality is the foundational concept that defines the relationship between an "author" and

her "work", for copyright in a work comes into existence at the moment when an author produces fixed original expression". (Ginsburg, 2003) seems to concur with this statement when she opines that "originality is the overarching standard of authorship".

The concept does not only define the relationship between an author and her work, it also defines the relationship between the work and the public (users). This is so because a definition of the standard of originality required for copyright protection can change "both the number and types of works that can claim copyright protection" (Abrams, 1992). Therefore, in Abrams' words, "what is at stake in any definition or redefinition of originality is the coverage of the copyright monopoly and the balance between copyright owners and users at its most basic level" (Abrams, 1992).

Even where a work has been adjudged original, it would not come under protection of copyright law in Nigeria and South Africa unless it satisfies the requirement of fixation. Fixation, which may be regarded as a twin concept of originality, could be seen as "the act of preserving something, even if temporary" (Heymann, 2009), or the act of "storage of sounds or images or both sounds and images or data or signals representing sounds or images or both sounds and images" (section 1(1), Performers Protection Act, No. 11 1968, South Africa). Even so, the concepts of fixation and originality do not enjoy generally acceptable definition. In particular, the definition of originality and fixation under the Nigerian Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004 (NCA) is unclear. On the other hand, the South African Copyright Act, No. 98 of 1978 (SA Copyright Act) does not define originality and fixation. However, case law under both statutory regimes has pronounced on the concepts, especially originality under SA Copyright Act.

Therefore, this article aims to examine the scope and standard of originality and fixation in Nigeria and South Africa. To this end, it analyses relevant provisions of the NCA and SA Copyright Act while adopting a comparative approach. To be effective, the article briefly highlights some international perspectives on the concepts before focusing on the Nigerian and South African situations. Specifically, it draws on developments in select common law countries and civil law countries to throw light on the Nigerian and South African jurisprudence on originality and fixation. In this regard, reliance is placed on relevant statutory provisions, judicial authorities and academic literature from Nigeria, South Africa, among others. The article is divided into four parts. This introduction forms the first part. The concepts of originality and fixation are discussed in the second and third parts respectively, while the conclusion comes at the fourth part.

Originality

International copyright treaties do not define the scope of originality (Gervais, 2002). But, the requirement of originality for protection may simply be presumed from the treaties. For instance, after defining the literary and artistic works falling under its ambit, the Berne Convention provides that "translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work" (Berne Convention, 1886: Article 2(1) and (3)). Thus, it appears the definition of the scope of the concept was reserved for national legislators.

Even so, most national copyright laws do not define the concept. They stop at expressly requiring originality as criterion for copyright protection, among others, for copyright protection (Gervais, 2002). The same is true of SA Copyright Act, which will be discussed shortly. However, some national copyright laws seem to go further to proffer insights on what originality connotes. Article 3(1) of the Bulgarian Law on Copyright and Neighbouring Rights provides that the "subject matter of copyright shall be any work of literature, art and science, which is a result of creative activities [...]". The Law on Protection of Literary and Artistic Property of Burkina Faso declares in Article 5 that it protects "works of the mind that are original intellectual creations in literary and artistic areas". The Law goes ahead in Article 118 to define "original works" to mean "a work which, by its characteristic features and form, or by its original form alone, allows its author to be identified". In Malaysia, a work is eligible for copyright protection if, among others, "sufficient effort has been expended to make the work original in character" (section 7(3)(a), Copyright Act 1987, Act 332, Laws of Malaysia). As will be shown shortly, Nigeria has similar provision.

The foregoing notwithstanding, there have been judicial attempts at defining the scope of the concept. Such attempts have led to the existence of two schools of thoughts: the objective school and the subjective school (Gervais, 2002). The objective school has its roots in the common law tradition led by Britain and it is established in a long line of cases (See for instance, *University of London Press v University Tutorial Press* [1916] 2 Ch. 601; *Ladbroke (Football) v William Hill* [1964] 1 All ER 465; *Exxon Corp v Exxon Insurance Consultants* [1982] RPC 69; *Express Newspapers v Liverpool Daily Post* [1985] FSR 306; *Sawkins v Hyperion* [2005] RPC (32) 808).

The school is otherwise known as the "sweat of the brow" or "industrious collection" school (Drassinower, 2004). According to this school, for a work to be original it is necessary to show that sufficient skill and labour or industry was expended in making the work. It is not necessary to show creative input in making the work (Drassinower, 2004). Since its copyright jurisprudence is influenced by the British copyright law being a former colony of Britain, this school of thought held sway for a long time in Canada (For instance, *Kelly v. Morris* (1866), L.R. 1 Eq.

69; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R; *CCH Canadian Ltd. v. Law Society of Upper Canada* [2002] FCA 187) before the judgment of the Canadian Supreme Court in the case of *CCH Canadian Ltd v Law Society of Upper Canada* ([2004] 1 SCR 339), wherein it was held that for a work to be held original, its creation must involve some "skill and judgment" (Drassinower, 2004; Craig, 2005).

Similarly, as a former British colony, the objectivist approach was adopted in Australia (For instance, *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112; *Emerson v Davies* 8 F Cas 615 (Mass CC, 1845); *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49) until the decision of the High Court of Australia in the case of *IceTV Pty Ltd v. Nine Network Australia Pty Ltd* ((2009) 239 CLR 458), which introduced the "independent intellectual effort" or "sufficient effort of a literary nature" in determining the originality question (Lindsay, 2012; Fitzgerald and Dwyer, 2012; Ricketson, 1991-92). Thus, it appears that Canada and Australia are moving away from the objectivist stance on the concept of originality.

Indeed, scholars seem to be in agreement that both countries have adopted a middle course between the objective school and subjective school of originality (for instance, Craig, 2005). The view has been expressed that Britain appears to be moving towards the same course as Canada as some cases exist wherein the British courts have used the terms "original artistic skill and labour" or "original skill and labour" (Gervais, 2002; *Newspaper Licensing Agency Ltd v. Marks and Spencer Plc* [2002] RPC 4; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700). This position does not seem unfounded. Indeed, there are authorities suggestive of the fact that the British position is moving away from the middle course adopted in Canada and aligning with the "author's own intellectual creation" test adopted in the European Union (which is a subjective test) (Section 3A(2), Copyright Designs and Patent Act; *SAS Institute Inc. v World Programming Ltd* [2013] EWCA Civ 1482; Savvides and Ibbetson, 2016).

The subjective or creativity school, which has its roots in the civil law tradition led by France, (Gervais, 2002) holds that in determining originality, "an approach that requires searching not for evidence of skill and labour but rather for the mark of the author's personality in the work" should be adopted (Gervais, 2002). Put differently, the creativity school "holds that a finding of originality is impossible in the absence of creativity. The standard of originality requires at least minimal creativity" (Drassinower, 2004). The form of creativity required here is not the novelty standard required under patent law. It is the creativity, which connotes that the work in question is not merely a copied work but one that involves labour, skill and some independent judgment or intellectual activity on the part of the author. This school of thought is now firmly established in the US following the US Supreme Court decision in the case of *Feist Publication Inc. v Rural Telephone Service* (499, U.S. 340 (1991); Abrams, 1992; Littrell, 2002).

Like other copyright laws, the NCA makes originality a criterion for copyright subsistence. Accordingly, section 1(2)(a) provides that "literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character". Although this provision does not mention cinematograph films, sound recordings and broadcasts, it has rightly been argued that its application on those works can be implied (Ekpa, 2014). Some scholars, believing that the NCA did not define originality, have attempted some definition within the context of the NCA. According to (Ocheme, 2000, p31), it "denotes that which is new, not copied or imitated from another work". (Nchi, 2000, p382) sees it as that which "emerges for the first time as opposed to a reproduction". In (Ekpa's, 2014) view:

> originality in this context means that the creator is creative in his work, that the expression of his ideas are fresh or newly created and not copied from pre-existing work ... what is paramount in considering the originality of a copyright work is that the work must originate from the author. It definitely must have its origin in the labour of the author, his property and his creation. (see also, Ugbe, 2002).

But the above provision seems clear. It gives an inkling as to the concept of originality under the NCA. It requires that "sufficient effort" be expended in the making of a work for it to be regarded as original. The line of cases on subsistence of copyright in Nigeria confirms this assertion.

First, there is the case of *Offrey v Ola* (cited in Oriakhogba, 2014, 27), wherein the plaintiff designed and put out for sale a school record book known as "New Era Scheme of Work and Record Books". The plaintiff's labour in producing the book mainly consisted in the drawing of several horizontal and vertical lines. He later discovered that the defendants were producing and selling some record books, which were materially the same as his own especially at pages 1to 52 of the alleged infringing book. Consequently, he sued for damages and injunctions. The court dismissed the plaintiff's claim and held that:

> [...]there was no evidence that the plaintiff had put into its production some substantial amount of labour. The record book merely showed a neat layout of vertical and horizontal columns on pages 1 to 52. Such a layout could not be called an original literary work or an original compilation for giving ready, convenient and accurate information to people who needed such information. The plaintiff had therefore not established that the record book in question is an original literary work or compilation being the result of his labour and skill.

There is also the case of *Yemitan v Daily Times & Anor.* ([1977-1989] 2 IPLR 141-156), where the plaintiff alleged that the copyright in his article titled "The day the Lagoon Caught Fire" was infringed by the defendant. According to the plaintiff,

the defendants in their magazine called the "Headlines" reproduced his said article without authorisation. Thus, the plaintiff sued for damages and injunctions against the defendants. The court, while deciding in favour of the plaintiff held that copyright in a work "belongs to the author, who is the one that actually expended the work, labour, knowledge and skill".

The foregoing cases were decided before the coming into force of the NCA. They were decided under the repealed Copyright Decree, No. 61 of 1970 (section 1(2)(a), which provision on originality was simply rehashed under the NCA. Little wonders, therefore, the pronouncements therein reflect the attitude of the court on the issue of originality under the NCA.

This assertion is confirmed by the more recent case of *Spreevision Ltd & Anor. v Nestle Nigeria Plc & Ors* (Suit No.: FHC/IKJ/CS/183/2012, unreported ruling of 10 Seotember 2013 per Yinusa J). In that case, the plaintiffs claim that they built a concept for the development of digital kiosk pavilion, which they stored in a compact disk and flash drive and sent to the defendants. They further alleged that the defendants asked them to build a kiosk for demonstration based on the concept for inspection. According to the plaintiffs, they did not hear from the defendants again but discovered later that the defendants had gone ahead to develop the kiosk and displayed it at the premises of Universities of Lagos and Ibadan respectively. Consequently, the plaintiffs sought to enforce the copyright in their concept for the development of digital kiosk pavilion as an artistic work through this suit. The defendants filed a motion of preliminary objection to the suit on the ground, among others, that the plaintiffs possess no copyright in the subject matter of the suit. According to defendants, the plaintiffs admitted in paragraphs 7, 8 and 14 of their statement of claim that the subject matter of the suit "was intended to be used as a model or pattern to be multiplied by industrial process" (p4). As such, the defendants rightly contended that on the basis of section 1(3) NCA the plaintiffs have no copyright in the alleged artistic work. By virtue of section 1(3) NCA, an artistic work is ineligible for copyright protection if, at the time of its creation, it is intended by the creator to be used as model or pattern to be multiplied by any industrial process.

The court upheld the defendants' objection and in so doing commented on the subsistence of copyright under section 1(2) as follows:

> [r]ecognition of copyright is premised on some sufficient effort having been expended on the work to give it an original character [...] for a work to be eligible for copyright protection, it must be original. The essence of originality is that the author of the work must have devoted skill and labour to its creation. (p10-11).

Interestingly, although the court confirmed that the subject matter of the suit is an artistic work, it did not rule on the defendants' argument highlighted above which

was the basis of their objection. Instead, the court upheld the defendants' objection on another ground. According to the court, the:

> Plaintiffs were unable to establish that they independently created the work or that they have obtained a license [...] of the original owner before importing into Nigeria a copy of the work. Without such consent [...] it would amount to a reproduction which in itself is an infringement [...]. The Plaintiffs are under a duty to show sufficient effort in the work, the subject matter of the action to demonstrate that they have given the work an original character thereby being the creator of the copyright. (pp.11-12)

It is respectfully submitted that the court detoured from the main argument raised in the defendant's objection. From the pleadings, it was never in issue that the subject matter of the suit was created by the Plaintiffs. In other words, the subject matter of the suit was not created by the defendants. So, the issue of reproduction and infringement by the Plaintiffs as alluded to by the court was irrelevant. Having found that the subject matter of the suit is an artistic work, the court ought to have pronounced upon whether or not the Plaintiffs intended to use it as a model or pattern to be multiplied by any industrial process as rightly argued by the defendants. Such pronouncement would have validly justified the court's ruling. This is especially so since provisions similar section 1(3) NCA have been applied to prevent copyright claim on designs intended to be applied industrially. For instance, there is the UK case of *Interlego A.G. v Tyco Industries Inc. & Ors* ([1988] UKPC 3) where in the House of Lords (HL) applied section 10 and the Seventh Schedule, paragraph 8(2) of the defunct UK Copyright Act, 1956 to a system of model-building consisting of plastic brick-shape blocks used in making children's toys. Section 10 contained "a code for regulating the extent and subsistence of copyright in relation to an artistic work where a design corresponding to such work is applied industrially". While the Seventh Schedule, paragraph 8(2) excluded "any artistic work made before the commencement of section 10 which, at the time when the work was made, [...] was used, or intended to be used, as a model or pattern to be multiplied by any industrial process" among others from copyright protection. Applying these provisions, the HL held that if "such designs are, at that time, used or intended to be used for the purpose of industrial reproduction, they are not to qualify for copyright under the Copyright Act 1956".

Nonetheless, the court's position in *Spreevision* (above) on the standard of originality under the NCA is supportable. In this regard, there is also the case of *Ifeanyi Okoyo v Prompt and Quality Services & Anor* ([2003-2007] 5 IPLR 117-135), wherein the plaintiffs sought to enforce their copyright in their architectural drawings, which the defendant allegedly infringed. The defendants filed a notice of preliminary objection to the suit on the ground that the plaintiffs lack *locus standi* to institute the suit because they are not registered architects under the Architects (Registration, etc) Act. In considering the objection, the court had to

determine the criteria for enforcement of copyright in Nigeria. Of present relevance is the ruling of the court on originality. After reproducing section 2(1) above, the court stated that:

> it is pertinent to observe that a literary or musical work is not eligible for copyright unless sufficient effort has been expended in making it in order to give it an original character. This is a matter of facts which must be proved by evidence. Save as above, the author of an artistic, particularly, work of Architecture, is not required to fulfil any other conditions to make his work eligible for Copyright. (p.130).

The concluding part of the above pronouncement should be understood within the context of the above case alone. It must not be taken as a general provision of the law regarding copyright protection in Nigeria. This is so because originality is only one of the conditions for copyright eligibility under the NCA. The conditions include fixation (which will be discussed shortly), among others.

That being said, the court's position in the case of *Yeni Anikulapo-Kuti & Ors. v Iseli & Ors* ([2003-2007] 5 I.P.L.R. 53-73), which involves issue of authorship and copyright subsistence in a musical work, should be noted. In that case, the court held that "a musical work must originate from its author who has expended special skill, and labour in producing it" (p70).

In essence, a determination of originality under the NCA will involve a definition of the term "sufficient effort". The question of what is "sufficient effort" is obviously a matter of degree, which would be determined on a case-by-case basis. And it appears the courts will not settle for some trivial amount of labour and skill or "sweat of the brow" when determining the question of originality. Also, the question of "sufficient effort" simply means determining the amount of "sweat of the brow" or "labour and skill" and not the creativity expended in making a work.

Thus, the determination of whether a work is original under the NCA would require an objective test. That is not to say in determining the amount of "sweat of the brow" the courts are completely precluded from making other value judgments such as determining questions of creative input, intellectual contribution or creative choice, where necessary. Neither is an ordinarily creative work precluded from copyright protection under the NCA. The NCA merely lays down a low standard in answering the originality question with the effect that works, which may not ordinarily qualify as creative, would be regarded as eligible for copyright if "sufficient effort" were expended in making them.

The fact that the NCA protects literary, artistic and musical works irrespective of their literary, artistic or musical quality gives credence to this argument. Further, although copyists are not protected under the NCA, a work shall not be ineligible for copyright protection merely because the making of the work involved an infringement of copyright in some other work (section 1(4), NCA). This

underscores the fact that the NCA does not seek to protect copyright arising from a novel work. It seeks to protect copyright in a work, which originates from sufficient effort or "sweat of the brow" or "labour and skill" of the author.

Unlike the NCA, the SA Copyright Act does not give a hint on the definition of originality. It merely affords protection to copyright works "if they are original", among other things. That notwithstanding, the South African courts have executed the task of defining originality under the SA Copyright Act over time. From the authorities (See for instance, *Kalamazoo Division (Pty) Ltd v Gay* [1978] (2) SA 184 (C); *Northern Office Micro Computers (Pty) Ltd v Rosentein* [1981] (4) SA 123 (c); *Saunders Valve Co Ltd v Klep Values (Pty) Ltd* [1985] (1) SA 646 (T); *Waylite Diaries CC v First National Bank Ltd* [1995] (1) SA 645 (A); Harms, 2013), it appears that, like Nigeria, the courts have aligned the South African definition of originality with the British "sweat of the brow" approach. This is informed by the fact that both legislation share roots with the Imperial Copyright Act, 1911 by reason of the colonial ties of Nigeria and South Africa to Britain. But, the Canadian intermediate approach of "skill and judgment" highlighted above seems to be lurking around the South African copyright jurisprudence as recent court pronouncements, examined below, suggest.

There is the High Court judgment in the case of *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* ([2014] 2 All SA 461), which involved alleged copyright infringement by the defendant in "the annual and/or weekly soccer fixtures or lists" belonging to the plaintiff. One of the issues the court had to decide was the existence of copyright in the works and this involves the question of originality. In its judgment, the High Court, per Kgomo J, adopted the Canadian Supreme Court definition of originality. The High Court further expressed the view that under "certain circumstances, extensive effort in making a compilation may be enough to render it original, even where there may be less skill involved" (p36). This view gives the impression that under the SA Copyright Act, circumstances may abound wherein something more than extensive effort may be required to cloth a work with the toga of originality.

Indeed, the view expressed by the High Court, per Berger AJ, in the case of *Moneyweb (Pty) Ltd v Media24 Ltd & Fadia Salie* ([2016] 3 All SA 193) appears to confirm this. The case involves claims of copyright by the plaintiff of seven of its articles published on its website and alleged infringement of the copyright in those articles by the defendant. In deciding whether copyright subsisted in the articles and whether the defendant infringed the copyright, the High Court had to determine the question of originality. After reviewing the positions of the South African Supreme Court of Appeal (SCA) in previous cases on originality, the High Court stated that:

> [...] the expression "sweat of the brow" is imprecise and capable of being misunderstood. A court will only be able to determine

> originality after it has weighed up all relevant considerations and made a value judgment. Our law still regards the time and effort spent by the author as a material consideration in determining originality. But the time and effort spent must involve more than a mechanical, or slavish, copying of the existing material. In other words, there must be sufficient application of the *author's mind* to produce a work that can be judged to be "original". (para.15). (italics mine)

However, the judgment of the SCA the case of *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* (*Haupt*) ([2006] SCA 39 (RSA)) is instructive. The case involves claims of copyright in "a computer program known as Data Explorer and also in certain tables (or database structure) and databases" by the plaintiff/appellant. In that case, the SCA rejected an attempt by the High Court to introduce the US creativity approach exemplified by the *Feist Publication* case. The appellate court held that "original" under the SCA is intended to have the meaning given to it in Britain. The SCA's position is expressed through Streicher JA as follows:

> [...] the High Court would seem to have accepted [...] that a 'minimal degree of creativity' was required to satisfy the originality requirement. They relied on the judgment of the Supreme Court of the USA [...]. However, the originality requirement in the Act was also a requirement in the Copyright Act 63 of 1965, which was repealed by it, and there is no reason to believe that it was intended to have a meaning different from the meaning it had in the repealed Act. The repealed Act was based on the Copyright Act of 1956 of the United Kingdom which had a similar originality requirement. For this reason 'original' in the repealed Act was probably intended to have the meaning it had been held to have in the United Kingdom. [...], a work is considered to be original if [...] its production required a substantial (or not trivial) degree of skill, judgment or labour. In Canada 'original' has likewise been interpreted so as not to require creativity. In CCH Canadian Ltd v Law Society of Upper Canada it was held: '[A]n original work must be the product of an author's exercise of skill and judgment [...]. (para.35)

Moreover, the SCA further expressed her unwillingness not to decide on whether the Canadian approach on the originality question should be adopted in South Africa. In effect, the tradition UK "sweat of brow" or objective approach is the established and binding approach when addressing the originality question in South Africa and not the High Court's middle course approach (Canadian approach) adopted in *Moneyweb* above.

Fixation

Not all countries require fixation as part of the condition for copyright protection (White, 2013). In fact, the TRIPs agreement does not contain any express provision in that regard. Even the Berne Convention, which the TRIPs agreement (Article 1) incorporates, does not state any minimum standard for fixation. It merely states that copyright shall subsist in literary and artistic works whatever may be the mode or form of its expression (Berne Convention, Article 2(1)). Regarding the mode or form of expression, the Berne Convention (Article 2(2)) states that it "shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form". In essence, the Berne Convention left fixation issues to be determined by the legislature of respective members of the Union. According to (White, 2013) the absence of fixation requirement in the Berne Convention "is meant to allow the Convention's [...] member nations to determine individually whether they wish to impose a requirement that the work seeking protection be fixed in a tangible format, that it need not be fixed at all, or that it must meet some other standard in between these extremes".

Countries like UK, USA and Australia, with the common law tradition have one form of fixation requirement or the other (Copyright, Designs and Patent Acts 1988 [CDPA - UK], s3(2); Copyright Act 1976 [US], ss 101 and 102; Copyright Act 1968 [Australia], s10; Adeney, 2011; White, 2013). Interestingly, the Canadian copyright legislation does not expressly require fixation for copyright subsistence. The statute talks about published or unpublished works (Copyright Act 1985 [Canada]). Even so, the fixation requirement is judicially implied as shown by case law (For instance, see *Canadian Admiral Corporation Ltd v Rediffusion Inc* [1954] Ex CR 382. See also Adeney, 2011). But countries with civil tradition are mostly silent on the fixation requirement (Goldstein, 2001, p196-197; White, 2013). For instance, the French Intellectual Property Code 1992 protects "the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose". It also deems a work to "have been created, irrespective of any public disclosure, by the mere fact of realisation of the author's concept, even if incomplete" (Articles L112-1 and L112-2). The Dutch Copyright Act (DCA), 1912 (Netherlands) is another example. Although it contains a list of protectable works under its ambit in Article 10, it does not make express provision for fixation (Arkette 2015; Hugenholtz, 2012. In fact, protection under the DCA has been extended to tastes and scents of food and fragrance respectively (Supreme Court 16 June 2006, NJ 2006, 585 [*Kecofa v Lancôme*], [2006] ECDR 26; District Court of Amsterdam 9 August 2001, AMI 2001, p. 155-157 [*Manfred Spaargaren Confiserie v. Da Vinci Bonbons & Chocolade*; Rb. Gelderland [*Levola Hengelo BV v Smilde Foods BV*] Netherland, docket no. 272 772 2014/603).

It has been suggested that the "differences in proof and pleading requirements and civil nations' more relaxed view of copyright protection" justify this

distinction (White, 2013; Goldstein, 2001, p196). Further justification for the absence of fixation in France for instance, is to give authors the right of "divulgation", i.e. "the right to choose to keep their work private by withholding publication" (Carpenter and Hetcher, 2014; Latreille, 2009). This right usually comes alive in instances where an author's "extemporaneous or unfinished work is copied without consent" (Carpenter and Hetcher, 2014).

The fixation requirement serves very useful purposes, the most fundamental of which is the evidentiary purpose (Adewopo, 2012, p20; Brown, 2014). Even in countries like France where the copyright law is silent on the fixation requirement, the evidentiary purpose of fixation has been established (Darclaye, 2008). (Perzanowski, 2010) provides a lucid explanation of the evidentiary purpose of fixation. According to the author, by the fixation requirements, copyright law "avoids problems of proof that would otherwise stymie enforcement efforts. Fixation clarifies questions of authorship and ownership, and it defines the bounds of copyright grant through reference to a stable instantiation that can be compared to alleged infringements." Another purpose of fixation, as suggested by (Carpenter and Hetcher, 2014) is that it acts as "check on the capaciousness of the originality requirement". The point being made is that without fixation requirement, the amount of works coming under copyright protection may be open-ended since the only requirement for eligibility would be originality. In the authors' view, "the fixation requirement cabins the writ of copyright, as a range of original works would be copyrightable but for fixation". A third purpose is proffered by (Gordon, 1989) to the effect that fixation allows third parties to interact appropriately with intellectual works. According to this author, fixation requirement provides tangibility for copyright works thus enabling authorised and fair use of the works. Perhaps, a fourth purpose would be that fixation of a work makes it easy to determine when the work was made when considering copyright duration (Heymann, 2009). It has also been regarded as serving the purpose of notice to other creators and users of work as to rights existing in a work (Loren, 2016).

With the exception of broadcast or programme-carrying signal, no work under SA Copyright Act shall be eligible for copyright unless it has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form (section 2(2)). For broadcast, eligibility for copyright protection is allowed only when it has been broadcast, while programme-carrying signals enjoy such eligibility only when it has been transmitted by satellite (Section 2(2A)).

Writing is defined by SA Copyright Act to include any form of notation, whether by hand or by printing, typewriting or any similar process (Section 1(1)). Although, differently worded, the SA Copyright Act's fixation requirement shares similarity with the fixation requirement provided for in section 3(2) of the CDPA. This similarity is manifest in the requirement in both laws for recording in a material form. But the term "material form" as used in the fixation provision of

SA Copyright Act leads to a further question like what is a material form? The term is not defined in SA Copyright Act, neither has it been defined by South African courts (van der Merwe et al, 2016, 209). To resolve the question, a definition of the term in section 10 of the Australian Copyright Act may be relied up. According to that section, "material form, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation from which substantial part of the work or adaptation, (whether or not the work or adaptation, or substantial part of the adaptation) can be reproduced". Further, UK case law suggest that for a work to be held to have been recorded or stored in a material form, the recording or storage should have certain level of permanence and be mere ephemeral (*Abraham Moon & Sons Ltd v Thornber & Ors.* [2012] EWPCC 37; *Creation Records v New Group Newspaper* [1997] EWHC ch 370; *Komesaroff v Mickle* [1988] RPC 204; *Merchandising Corporation of America v Harpbond Ltd* [1983] FSR 32).

That being said, it should be noted that fixation is not a compulsory requirement for copyright eligibility in respect of performers' rights in their performances in South Africa. Accordingly, performers are protected provided their performances took place, or are broadcast without a fixation, or are first fixed in South Africa (section 4, Performers Protection Act).

Under the NCA, a literary, musical or artistic work will not be eligible for copyright protection unless the work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device (Section 1(2)(b)). This provision was briefly pronounced upon in the case of *Yeni Anikulapo-Kuti & Ors. v Iseli & Ors* (supra). The case involves claims for injunctions against the defendants by the plaintiffs as administrators of the estate of the late Nigerian music icon Fela Anikulapo-Kuti (Fela) on the ground that the defendants were about to record and sell certain pieces of music composed by Fela during his lifetime. As a defence, the defendants averred that the pieces of music upon which the plaintiffs' claims rests are not in any fixed medium. The defendants did not present any evidence. They merely rested their case on that of the plaintiffs'.

After reviewing the evidence presented by the plaintiffs, the court found that the plaintiffs sufficiently sown the existence of the pieces of music in issue. In reaching the conclusion, the court held – per Aliyu J. – that the expression "fixed in any medium of expression now known or later to be developed" as stated above does not need any technical interpretation (p71). According to the court, the "words are clear and unambiguous and they should be given their ordinary natural meaning; the phrase simply means that the [...] work to be eligible for copyright must be in tangible medium without specifying the form in which it must be".

Thus, it could be argued that any medium that makes perception, reproduction and/or communication of a work possible would be sufficient to satisfy the fixation requirement in the NCA. In this regard, the fixation requirement under the NCA shares similarity with the USA fixation provision contained in section 102(a) US Copyright Act (USCA). That provision has been interpreted in several US cases (For discussion, see White, 2013; Brown, 2014; Carpenter and Hetcher, 2014) on which Nigerian courts may rely when faced with fixation issues. However, both Acts differ at the point where USCA requires fixation for a period of not more than "transitory duration" as an additional fixation requirement. That notwithstanding, the NCA may be interpreted to the effect that the type of "fixation required to vest protection is beyond the transient projection. The medium must allow for some sustained presence of permanent nature" (Adewopo, 2012).

Also, a further reading of the provision in the NCA shows that mention is not made of cinematograph films, sound recordings and broadcast. This creates an impression that those works do not require fixation for copyright eligibility in Nigeria. Indeed, a broadcast is "exempted from [fixation] requirement as it may be protected even if it is unfixed in form. For instance, a live broadcast to the public is for this reason not required to be simultaneously recorded in order to gain protection" (Adewopo, 2012). The definition of broadcast under the NCA confirms this position. According to the NCA (section 51(1)), broadcast means sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes re-broadcast. However, the same cannot be said of cinematograph film and sound recording. Cinematograph film is defined to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and it includes the recording of a sound track associated with the cinematograph film (section 51(1)). Similarly, sound recording means the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film (section 51(1)).

The effect of the foregoing is that cinematograph film and sound recordings require some form of recording which makes them capable of being perceived, reproduced and communicated. In respect of performers' rights, the NCA does not make fixation of performances as a requirement for enforcement. After stating the acts over which a performer has exclusive control in respect of his performance, the NCA defines performance to include a dramatic performance, musical performance and a reading or recitation of literary or any similar presentation which is or so far as it is a live performance given by one or more individuals (section 51(1)).

In comparison with the SCA, the NCA appears broadly worded and more forward looking than the SCA such that one may want to recommend the fixation provision in the NCA for South Africa. But, as argued above, the SCA fixation

requirement is similar to the CDPA of UK. On the other hand, the CDPA fixation requirement has been regarded as being "most similar to the US's fixation requirement" (White, 2013) with which the NCA shares partial similarity. By implication, it would mean that a court applying both the SCA and NCA fixation provisions would reach similar conclusions.

Conclusion

Attempts at defining the concept of originality have led to the rise of two schools of thoughts: the objective or "sweat of the brow" or "skill and labour" school; and the subjective or creativity school. The objective school has its roots in common law tradition exemplified by the UK (before influence of the European Union), Canadian and Australian copyright laws. Recent developments in these countries, however, show that they are moving towards a middle course between the objective and subjective schools. For instance, the Canadian courts now requires some form of "skill and judgment" for a work to qualify as original. The subjective school is linked to the civil law jurisdictions exemplified by France. It is also the prevailing school in the US. The definition of originality under the NCA still follows the objective school. The law requires 'sufficient effort' in the making of a work to claim originality. However, it appears the courts are not completely precluded from making other value judgments such as determining questions of creative input, intellectual contribution or creative choice, when resolving issues of originality under the NCA. Originality under the SCA also aligns with the objective school. However, recent judicial pronouncements show that the Canadian intermediate approach of "skill and judgment" seems to be lurking around the South African copyright jurisprudence.

Fixation, as a foundational concept, is not a requirement for copyright protection in all national copyright legislations. Where fixation is required, it is important for the work to be fixed in a medium that allows perception, reproduction and communication of the work. In Nigeria as well, as South Africa, it is required for protection of literary, artistic and musical works, cinematograph films, sound recordings, and computer programmes (South Africa). It is not required for live performances (by performers) and broadcasts. Specifically, it is not required for the protection of programme-carrying signals in South Africa. The fixation requirement under the NCA appears widely worded and more progressive than the SCA provision. Even so, because of the similarity which the NCA and SCA fixation requirements share with those under the UK CDPA and USCA, it appears that a court applying both provisions would reach similar conclusions.

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CIVIL ENFORCEMENT OF TRADEMARK RIGHTS IN ZIMBABWE

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Abstract

Protection of property rights is one of the key functions of any legal system. The assertion of rights by right holders in the event of infringement or misuse is one of the key roles of the civil courts in Zimbabwe. A number of courts including the Magistrates Court, the High Court, and the Supreme handle civil trademark disputes in Zimbabwe. The civil process is one of the key enforcement mechanisms available to trademark right holders in Zimbabwe. Creativity in the intellectual property sector is hinged in part on the level of enforcement availed by the law and the courts to right holders. Without the law providing real remedies when infringement of intellectual property rights takes place, rights accorded by the law to trademark owners will be of no value. This study examines the status of civil trademark law in Zimbabwe with a view to ascertain the extent of its effectiveness. The following aspects of the civil litigation process were looked at; the cost involved, the duration of proceedings, the right of audience, the available remedies, the set-up of the courts, evidence required, onus of proof and other aspects. These challenges can be resolved by a number of measures which do not require infrastructural or expensive changes in the legal system.

Keywords

intellectual property, trademark, civil, enforcement, Zimbabwe

Introduction

Enforcement of rights accorded by the law is very important for the full realisation of any given rights. According to Keplinger (2008, p.2) the protection of property rights is one of the keystones of a free and flourishing society. Protecting intellectual property (IP) from unauthorised use and ensuring that creators, rights holders and governments reap the full benefits offered by the IP based industries ought to be a top priority at both national and international levels. To a larger extent the judiciary plays an important role in civil enforcement of any intellectual property rights including trade mark rights. Without the ability to get remedies from competent courts in cases of infringement, trademark rights given by the law can become ineffective and of no use. This has led Keplinger to argue that:

> … IP rights are only valuable if they can be protected, and enforced: "a right without a remedy is not a right." While digital technologies have revolutionized the way in which we create and do business, those same technologies have fueled a dramatic escalation in IP-crime. Combating IP infringement, especially in the serious forms of counterfeiting and piracy, is now a major challenge for many countries and regional institutions. (Keplinger, 2008, p. 2)

One area of IP affected by infringements is trademark law. For the law to be effective and for right holders to have comfort that their investments are protected affected intellectual property rights holders must have real legal recourse in the event of infringement of their rights. In this way right holders may reap the benefits of their investment and rights.

The Paris Convention for the Protection of Industrial Property (Paris Convention) in Article 10^{tr} (1) imposes an obligation to member nations to have appropriate legal remedies in their legal systems in matters concerned with trademarks and other Intellectual Property Rights (IPR) rights. Trademarks are mentioned by name in the article to emphasise their importance. This requirement is further confirmed by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in Article 41 (1). The Article emphasises the need for nations to set up good and effective enforcement systems that prevent infringements. These systems must be both expeditious and deterrent in nature to would be infringers. Zimbabwe is a member to both the above Treaties. Zimbabwe has domesticated some of the enforcement provisions of the international instruments in its national laws. See for example the Trademark Act (Chapter 26:04.

The WIPO Handbook (2004) defines a trade mark as any sign that individualises the goods of a given enterprise and distinguishes them from the goods of its competitors. The trademark must clearly be a badge or mark of origin of the goods. In this regard the Supreme Court of Zimbabwe in the case of *Zimbabwe Gelatine (Pvt) Ltd v Cairns* SC-130-02 at 4 of the cyclostyled judgement stated that:

> The purpose of registration of a trade mark is that no other party should use the trade mark. Kerly's *Law of Trade Marks and Trade Names* at p 12 para 2:08 says:
> "The function of a trade mark is to give an indication to the purchaser … of the trade source from which the goods come or the trade hands through which they pass on their way to the market."
> It follows that once a trade mark is registered, persons who purchase goods with the registered trade mark associate those goods with the owner of the trade mark. (Supreme Court, 2002, p.4)

In other words the products of two competing producers must clearly show that they are manufactured by different enterprises even though they are of the same type.

Intellectual Property Enforcement in Zimbabwe

Trademark infringement and counterfeiting activities are on the rise globally and some of such goods are finding their way to the market in Zimbabwe. Various goods are passed off, infringed or counterfeited in various parts of Africa. These range from luxury goods, medicinal drugs, motor vehicle spares, seed, pesticides and other commodities. Some Zimbabwean right holders have been victims of this problem. Cases of counterfeit seeds, ball point pens, motor vehicle spares such as filters and other commodities have been reported in the press and other forums in Zimbabwe. Some of the cases have found their way to the courts. The courts have also added their voice to the challenge of trademark infringement and other IP violations in Zimbabwe. In the case of *S v Moyo &Anor* HB-21-09 Justice Ndou noted that:

> This is novel prosecution in this region for the protection of the creations of the human mind. This is a welcome development in our jurisdiction where …infringement is very rife but enforcement is extremely low. This scenario has resulted in the confusion of the public as to the source of the goods, products or service. In the circumstances intellectual property rights infringement has to be curbed with zeal and determination. (Justice Ndou, 2009, p. 3)

While this was said in the context of a criminal case, the point applies with equal force to civil disputes. The problem seems to be that there is little to no enforcement of intellectual property rights when they occur in Zimbabwe. There are a number of reasons for this state of affairs some of which are analysed below in section 2.

Use of the Civil Court System to Protect Trade Mark Rights

Intellectual Property (IP) is a technical, specialised and evolving discipline of the law in many developing countries. This holds true in Zimbabwe. In Zimbabwe the Magistrates court and High Court may deal with first instance civil disputes, the former court's jurisdiction is only limited by the value in the dispute. The Supreme Court handles appeals from the High Court.

The Trade Mark Act in section 9B(c) grants jurisdiction to hear trademark disputes to Magistrates Courts among other courts so long as the value in dispute does not exceed the monetary limit of the said court. This is a good development since Magistrates Court civil process is faster, cheaper and accessible as compared to civil litigation in the High Court. The court fees are less and the fact that Magistrates Courts are located in every town and district means that these are the courts that can be accessed by everyone in Zimbabwe. For the whole of

Zimbabwe there are only four High court sittings at Harare, Bulawayo, Mutare and Masvingo. These serve a population of over 13 million people. These courts have minimal number of judges. To that extent the provision of 9(B) and (c) of the Trademark act is user friendly and positive in so far as it allows the lower courts to deal with trade mark disputes. What needs to be addressed is the issue of training on the part of the courts.

The challenge that will require resolution is that of training. Training of judicial officers is essential for them to be effective. Judicial officers require on job training to appreciate trademark and other IP matters, otherwise the expected benefits of quick decisions and lower cost will not be realised at all. Indeed the case of *S v Moyo* HB-21-2009 discussed elsewhere in this article exposes that lack of knowledge among the magistracy. The substantive and procedural law errors made by the lower court in that case were too glaring. Of course, the other contributing factor is that the courts do not handle that many cases in IP as a result they are not familiar with the subject. This is because there are less disputes of IP related matters (whether criminal or civil) that are taken to the courts.

In terms of section 9(3)(a) of the Trademarks Act a court awarding damages may have regard to the flagrancy of the infringement and award additional damages or exemplary damages where they are justified. This is a good approach which bases the award of damages on the level of infringement. This provision clearly makes infringements unrewarding to infringers as they are made to pay for all the unjustified benefits they may have received from infringing activity. How the courts will interpret the provision is yet to be seen since the coming into force of the amendment that introduced the provision in September 2010. Another interesting feature of the provision is that it is in sync with article 41.1 of TRIPS.

The other constraint to enforcing rights under the civil process is the cost involved. Litigation is in general a slow and expensive process and it is more so in IP matters due to their complex nature. The United Kingdom Jackson report (2009, 3) finding that "in some areas of civil litigation costs are disproportionate and impede access to justice", applies to Zimbabwe. In Zimbabwe lawyers charge for their services based on the time spent on a case. In addition, the tariff of charges varies depending on the level of experience. The more experienced the lawyer is the more he or she charges for his or her services. The charges can range from $150 per hour to as much as $400 per hour for the senior counsels in Zimbabwe. Justice Harms notes that legal costs under the common law system tend to be more than in the civil law systems. For example he states that the cost of a typical patent case in the United States ranges from $1million to $3million. Of course trademark litigation is not as expensive in Zimbabwe but still relatively expensive. However, taking into account the average incomes in Zimbabwe the legal costs mentioned above are still high. The cost of litigation is definitely a factor that a claimant or right holder will consider before resolving to approach the courts in the case of an infringement of his or her trademark rights.

In Zimbabwe the general common law rule is that the award of litigation costs are within the court's discretion. In other words the court can order one party to pay the costs of the other. While the courts normally use the principle that costs follow the event, meaning that the successful party in a civil case is awarded costs by the court, this does not happen in every case. The purpose of this rule is to make frivolous litigation costly. The above rule does not always apply for a number of reasons. Secondly, even where the principle is used the costs recovered from the unsuccessful party are not the full costs that the successful party will have used in the case. This is because the costs have to be taxed according to a tariff and the tariff more often than not bears little relationship to what lawyers actually charge their clients. The court rules peg a tariff of fees that are recoverable from the unsuccessful party. This tariff is less than the tariff that lawyers use to charge their clients. As a result the costs recovered are only a fraction of the actual expenses incurred. This is a disincentive to civil enforcement of trademark rights through the courts. In addition, unless the unsuccessful litigant voluntarily pays the costs after taxation or agreement on the figure between counsels, the successful party has to execute to get the fees. Execution means more unrecoverable costs in some instances. The attempt at execution may fail if the judgement debtor has no executable property.

The courts do sometimes award costs at a higher scale or at a legal practitioner and client scale. This rate of costs is higher and the successful party recovers all fees paid to his or her legal practitioner. The challenge though is that this award is made in special circumstances where the other party has acted mala fides. For example through abuse of the legal system or behaved in a reprehensible manner during the court proceedings such as deliberately misleading the court, see for example *Momberume v Marange Apostolic Church of St Johanne & Ors* HH-130-13, *Gumbo v Steelnet (Zimbabwe) (Pvt) Ltd* HB-84-13 and *Mutandwa v Zhuwaki & Ors* HH-115-13. As a result such awards of costs are rarely made by the courts. In the main the costs at the ordinary scale are awarded in the majority of civil cases.

Barton and Cooper (2013) believe that adjudication must remain a central option of enforcing trademark rights. Its properties of transparency, clarity, power, precedent, and ability to bring a public regulatory voice to intellectual property disputes make adjudication an invaluable resource. But its accelerating costs, delays, uncertain expertise, and possible relational destructiveness have spawned a private market for alternative methods. The civil process must weather these challenges to remain relevant and useful to users.

It should be borne in mind that the duty to enforce civil rights rests with the right holder themselves. The 'private' nature of IP rights suggests the importance of resolution of disputes between parties either out of court or under civil law. It is therefore incumbent upon right holders to use the civil system, test it and where necessary advocate for reforms of the system.

In addition, for judges and the courts in general to function they need to preside over cases. Trademark owners have the role of referring their disputes before the court system. Right holders play a crucial role in ensuring effective enforcement of their rights. Right holders have to be vigilant at all times to ensure that their rights are not infringed and when infringed they should be quick to take action. The corrective action taken by right holders through the courts help to shape the IP jurisprudence of the nation. Without this critical stakeholder the court system will not function well.

The role of a judge in civil trademark enforcement

According to Jackson supra the creation and use of IP plays a crucial role in economic activity and in the achievement of many social goals, such as effective health care or renewable energy. He further asserts that the background to any IP regime must be a civil justice system which enables parties to assert or defend their IP rights (IPR). Such a civil justice system must deliver correct judgments at affordable cost in the complex field of IP. (Jackson Report, 2009). In terms of the Zimbabwean constitution judicial authority is vested in the courts. The courts are independent and only subject to the constitution and the law which they must apply impartially. No person or organ may interfere with the functions of the courts. A number of courts exist in Zimbabwe but of interest to the civil enforcement of rights are the Magistrates court, the High Court and the Supreme Court. The first two may deal with first instance cases while the latter one is an appeal court. The High Court also deals with civil appeals from the Magistrates courts. A specialist administrative court, the Intellectual Property Tribunal also exists in Zimbabwe. While it took long for it to be operationalised, this has since been done by the Judicial Law Amendment Act of 2017. The court was formalised as a specialised division of the High Court. Intellectual property rights are in the main quasi property rights in Zimbabwe. Therefore the approach of a court in handling trademark cases is similar as in any other civil matter. At common law and constitutionally all persons are entitled to a fair hearing before an independent tribunal in Zimbabwe.

The role of the judiciary consists in securing respect for and efficient enforcement of legislation and protecting rights and freedoms. It is not sufficient that legislation establishes rights or means of acquiring rights, acquired rights must be guaranteed through efficient channels of justice controlled by a solid judiciary capable of protecting rights against violation and abuse. Badrawi (2004, p.1) asserts that one of the most important rights for which protection and efficient enforcement must be provided relates to the human intellect. Human intellect plays a crucial role in the development of nations and companies. Inventions, arts and culture and other intellectual property spur economic growth and revenues for individuals and the State. As such intellectual property rights just like any other form of property deserves protection by the courts. Harms (2004, p.12) has added that the validity of intellectual property protection depends heavily on

judicial system performance and that a right without a remedy is an expensive fantasy. As such innovators and investors can only continue creating new technologies if there is a guarantee that that such right will be protected by the courts in the event of infringement. At the same time infringers will also know that infringement does not pay if properly granted rights are upheld by the courts.

In many instances technological developments outstrips legal development. This has happened in many areas of intellectual property law. See for example such cases as *Northern Office Micro Computers (Pty) Ltd & Ors v Rosenstein* 1981(4) SA 123, *MGM Studios Inc. v Grokster Ltd* 380 F 3d 1154 (9th Circuit 2004). Cybersquatting and domain names are one such area of law. As such judges in intellectual property cases have to be proactive and ever willing to learn. This fact was noted by the Zuallcobley et al. (2012, p.7) where they say, "Because IPR constitute an ever-changing area of law, the need for training may be an ongoing cost." Indeed the intellectual property landscape is littered with so many changes and developments such that the need for constant training of judicial officers involved in the subject is a must in order to apprise them of recent trends. Zuallcobley et al supra adds that without continuing training and education, specialised judges may be less equipped to hear new issues, and the court may become less efficient and consistent. In addition, to the training an individual judge must be able to be practical and proactive so as to deal with new issues using old laws.

An element of judicial activism is necessary to deal with such changes or with evolving challenges such as widespread infringements. A case in point is the approach adopted by the Chinese courts in 2005 where they held that landlords are contributory liable for trademark infringement perpetrated by their tenants with their knowledge. The plaintiffs were brand owners of Burberry, Chanel, Gucci, Louis Vuitton and Prada against the landlord of the Xiushui Market – also known as the "Silk Market" – together with five individual vendors. Each of these vendors had been identified as selling the plaintiffs' illicit brands on at least two occasions. The plaintiffs issued warning letters to the landlord seeking assistance in stopping the infringements. The landlord had ignored the letters. (WIPO Magazine 2008)

The courts confirmed that, after receiving notice of violations by particular vendors, the landlord must take prompt and effective measures to stop the infringements. The court also ruled that the landlord and vendors should be jointly and severally liable to pay compensation for losses, plus enforcement costs, totaling around US$2,500.The landlord appealed. On appeal the Beijing Higher People's Court rejected the appeals. It is submitted that the level of judicial activism in the above cases is to be encouraged in the field of trademark law where legal trends often lag development trends. Dealing with willful infringements and violation of trademark rights require a robust approach to enforcement.

Protection of intellectual property rights require judges and court officials who are proactive, willing to learn and robust for it to be effective. Without the prospect of protection of rights inventors and other intellectual property right holder will lose any incentive to invest in the creation of intellectual property. For the court to be able to control the proceedings effectively, the court must knowledgeable and up to date with the law and technology in dispute. While the common law tradition limit the judge to playing a passive role as compared to the inquisitive role of the continental judge, the judge in Zimbabwe must still control the proceedings. The Court is not merely an umpire but holds a duty to see to it that justice is done. Where necessary it is within the judge's responsibility to take measures that curtail the litigation process as well as reducing the costs of the process.

The role of lawyers in civil enforcement of trademark rights

Like their bench counterparts legal practitioners too have an important role to play in ensuring the adequate protection of trademark rights and other intellectual property rights. It is the legal practitioners who guide the court on the issues in contention, the applicable case precedents and the state of the law through the pleadings they file as well as the submissions they make in court. As such poor quality practitioners are unhelpful to the bench. In addition, it is from the pool of active practitioners that judges are normally appointed from therefore a well-qualified team of lawyers is an effective requirement for the enforcement of intellectual property rights.

Special intellectual property courts

Article 45.5 of the TRIPs agreement does not require of countries to create specialist courts for the enforcement of IP rights. The provision does not totally prevent but merely lays out a minimum requirement which a country may surpass if it chooses. What is the best option for Zimbabwe in this regard? Blakeney supra believes that the creation of specialist courts is not best for developing nations. Kong (2005) holds a different view. Commenting on the context of China, he says that judicial enforcement of IPRs requires highly specialised and professional adjudicators learned in science, engineering and law. Such professionals are then appointed to the IP specialist courts with the sole mandate of hearing IP disputes. His argument is that once that is done "a degree of consistency in law enforcement is assured" (Kong, p. 813). Others disagree with this approach:

> Specialist IP courts are not always affordable or feasible. In a given country there may be a general lack of resources, a low IP case load and little IP expertise. A centralized IP court may make access to justice illusory. Sometimes common sense may be more important than expertise because it is a moot point of whether all IP work is specialist work. Can a judge, who can read, not see whether one

> book is a copy of another? Can a judge, who can hear, not find that one piece of music is a copy of another? And can a judge, who lives in a real world, not decide whether or not one trademark is confusingly similar to another? (Harms, 2004, p.10)

This argument makes good sense for poor nations but can also be too simplistic to an extent. While the point concerning resources and case load are valid and strong the latter part of the argument is weak. Granted some IP matters may be decided on a common sense approach, this does not apply to all IP matters. For trademark the argument holds true. In Germany for example they have a Federal Patent Court whose role is to hear appeals from the German Patent and Trademark office and to hear patent validity cases. This fact clearly confirms the fact that they appreciated the complexity of these types of cases.

Speaking on the German Patent Court composition Bornkamm's (2004, p.4) said that the Patent Court is famous for one feature, that in trademark cases the judges all have a legal background, while in patent cases there is a mixed bench. In such cases the court is made up of judges with legal, scientific and technical background. As a consequence of this type of composition he notes that "it no wonder that this court hardly ever hears expert evidence". In addition to this court only specialist courts deal with intellectual property cases in Germany.

The argument made by Kong is valid but its applicability to a developing or a least developed nation that is grappling with resource constraints is doubtful. The argument about technicality is more applicable in the technical cases dealing with patents but not to other IP matters such as copyright and trademark. Resource constraints and fewer IP cases in Africa may suggest that such a move may not be the best. It is a fact that IP registrations by locals in Africa are insignificant and to suggest that there can be many IP disputes to keep such a specialist court busy may be a fallacy.

The Zimbabwe Intellectual Property Tribunal

Some developing countries such as Thailand have established specialised courts to hear IP disputes in their jurisdictions. Zimbabwe adopted a similar model by enacting the Intellectual Property Tribunal Act (Chapter 26:08) in 2001. It took until June 2017 for the court to be operationalised. Zimbabwe in its written response to the TRIPS Council in 2005 at the time it was seeking membership to TRIPS asserted that it had established an intellectual property tribunal to adjudicate over all civil matters pertaining to enforcement of intellectual property rights. It was further said that "recruitment of the judges of the Tribunal is complete and it is expected that the Tribunal will start operating shortly" (World Trade Organisation, 2005). Contrary to the optimism contained in the statement the court is to date not operational. It appears financial problems have hindered the commencement of operations of this important court in Zimbabwe.

The Intellectual Property Tribunal Act (Chapter 26:08) as read with various IP legislations empowers this court to hear disputes in civil matters concerning the enforcement of IP from the Trademarks Act (Chapter 26:04), Patents Act (Chapter 26:03), Copyright and Neighboring Act (Chapter 26:05), Geographical Indications Act (Chapter 26:06), Industrial Designs Act (Chapter 26:02) and the Integrated Circuit Layout-Designs Act (Chapter 26:07). In terms of section 7 and 8 of the Act, the Tribunal exercises jurisdiction in all civil matters arising from the above enactments. As part of its powers the court have the same powers as the High Court in civil cases in making orders requiring a party to pay security for costs, securing the attendance of any person before it and making discovery of documents. Another positive aspect of the Act is that the court has powers to enforce its decisions. This is unlike the Labour Court created by the Labour Act (Chap 28:01) which has no power to enforce its own judgements. The labour Court relies on other courts such as the Magistrate Courts and the High Court to enforce its judgements. This creates unnecessary further litigation in the said executing courts as well as delays in finalising labour matters. See *Ndlovu v Higher Learning Centre* HB-86-10, *Chiraire v Mt Darwin Bazaar* HH -121-13, *Baudi v Kenmark (Pvt) Ltd* HH-4-12. All these cases were opposed applications for enforcement of an arbitral awards in terms of the Labour Act. The position in the Intellectual Property Tribunal Act is positive and the legislature may have learnt from the challenges experienced in the Labour Court with regard to execution of awards and judgements.

The specialist tribunal does not take exclusive jurisdiction in all IP matters but shares it with the other civil courts. IP related disputes can be heard in the ordinary courts or in this specialist court. Section 9B of the Trademarks Act (Chapter 26:04) reads as follows;

> **9B.** Proceedings in respect of an infringement of a registered trade mark may be instituted—
>
> *(a)* in the Tribunal; or
>
> *(b)* in the High Court; or
>
> *(c)* subject to the jurisdictional limits provided for in the Magistrates Court Act [Chapter 7:10], in a magistrate's court: Provided that the Tribunal shall not have jurisdiction to entertain criminal proceedings.

The positive thing about the above section is that it does not bestow exclusive jurisdiction in IP matters to that specialist court but makes that court compliment the already existing courts in the country. This makes justice easily available to right holders.

Unlike the High Court Rules the legislation creating the Tribunal allows parties to appear before the court in person or as represented by legal practitioners. The allowance for self-actors to appear before the court can help individuals and small corporates to enforce their rights through the forum as opposed to the High Court which compels companies of whatever size to be represented by counsel thereby

making justice expensive for parties. This submission does not seek to show that counsel is not useful but rather that it is not every litigant who can afford legal representation. At the same time, without legal representation presenting a case before a court is a mammoth task for many people of average sophistication.

It is submitted that notwithstanding the positive aspects of the law creating the Intellectual Property Tribunal Act, Zimbabwe is not yet at a stage where it can afford a specialist court for intellectual property cases only. The level of IP cases brought before our courts over the years as well as the economic position of the country suggests other approaches to making justice available to intellectual property litigants are necessary. In recognition of this fact, the Tribunal has with effect from June 2017 been made a division of the High Court as opposed to a stand-alone court. This approach is an acceptable alternative to a stand-alone specialist court and is in accord with Blakeney's suggestion of a middle of the road approach. In this approach a nation establishes or strengthens existing commercial courts so that they can handle IP matters better. In this way IP matters may be diverted in the general court system to judges with specialist knowledge of the subject or a division of the existing courts.

The Judicial Laws Amendment Act number 7 of 2017 which operationalised the IP Tribunal as a division of the High Court sought to help the ease of doing business in Zimbabwe. The approach does have merit for a country like Zimbabwe. This Act effectively operationalised a law that had gathered dust since its enactment in 2001. What may now be needed is a training programme for the judiciary and other IP enforcement agencies. The need for training for judicial officers in Zimbabwe is very real. See for example the glaring errors that were done by the trial courts in infringement cases in the case of *S v Moyo & Anor* HB-21-09 and S v Chiadzwa *S v Chiadzwa* HH-28-04. The reviewing Judge and the appeal court respectively noted glaring errors that were done by the trial courts. The courts need to be equipped with pertinent trademark and other IP knowledge for them to function effectively for the good of business in Zimbabwe.

Challenges Faced in Civil Enforcement of Trademark Rights

Enforcement of rights through the civil method has met with some challenges in Zimbabwe. The problems range from lack of exposure to intellectual property matters including lack of judicial precedents for the courts, practitioners and owners and low levels of damages awarded for infringement cases. In addition, the country lacks a viable alternative dispute resolution system for intellectual property matters to complement the courts in certain circumstances. The cost of enforcing rights in the civil courts is also on the high side.

Lack of exposure to trademark and other IP matters

Intellectual property is a relatively complex and unfamiliar subject to many Zimbabweans. This unfamiliarity with the subject applies to an extent to lawyers and some judicial officers. The latter fact is confirmed by the fact that of the few reported intellectual property cases that were heard in the magistrate courts, the majority of decisions made were reversed on appeal. See for example the cases of *S v Ndlovu* supra and that of *S v Chiadzwa* HH-28-04. In both cases the relevant legal principles were not applied leading to the convictions being set aside on review and appeal respectively. The Kenyan Court of Appeal in the case of Sanitam Services (E.A.) Ltd v Rentokil Kenya Ltd & Anor [2006] eKLR 228/2004 acknowledged that intellectual property is a sparsely litigated subject in Kenya. The court said intellectual property is "…a branch of law which has scanty litigation and therefore minimal jurisprudential corpus in this country..." This observation with the necessary changes being made applies with equal force to Zimbabwe. There is few to limited jurisprudence in the field of intellectual property even for the so called soft IP such as trademarks.

Apparently this problem does not only apply to developing countries as the recent Canadian case of *R v Stowbridge* (2014 NLCA 4) will show. The accused was convicted by a judge in Newfoundland for selling trademarked goods without authority in violation of the Canadian Criminal Code and other IP violations. For the first offence he was sentenced to 180 days in prison and a fine of C$5000 and for the trademark offence he was sentenced to 180 days imprisonment to run concurrently with the copyright violation sentence. He appealed arguing that the penalty was disproportionate. The appeal court agreed with him. The prison term was reduced to two months and the fine was quashed. In doing so the appeal court noted that there were no reported cases in the province of Newfoundland in respect of trademark offences. The court was compelled to rely on decisions of other jurisdictions. There are indeed parallels between this case and the two cases cited above. Both courts did not have local precedents to rely on in dealing with the cases before them. Secondly the first instance courts made errors in sentencing the accused because of unfamiliarity in dealing with trademark offences.

Suitable case precedents do not exist due to limited decided cases having gone through the court system. The problem is most acute for matters dealing with damages for trademark infringement. As a result judges and practitioners have to grapple with lack of suitable precedents for use to guide their activities and work. This lack of precedents complicates and makes the work of lawyers and courts in intellectual property cases difficult.

The situation pertaining to the training programme of judges and magistrates apply with equal force to the position of lawyers in private practice in Zimbabwe. The relevant intellectual property statutes such as the Trademark Act (Chapter 26:04) and the Patent Act (Chapter 26:03), for example makes any registered lawyer a potential patent or trademark agent in Zimbabwe. This has the net effect

that a lawyer who never formally trained in intellectual property can become an intellectual property practitioner appearing before the superior courts of Zimbabwe. This situation may result in poor quality submissions before the court if such practitioner is not diligent. While some lawyers who have no formal training in the field of intellectual property can become good intellectual property practitioners, some form of on job training may be necessary in some instances. Likewise a court which is not very conversant with the area of law concerned cannot easily appreciate issues and manage the litigation effectively let alone pass quality and consistent judgements that can be relied on by the public. As a consequence consistency and predictability of the law are lost from such a court. It is submitted that a level of on job training for the courts is justified and necessary to improve on the quality of judgements made by the courts.

Low levels of damages awarded by the courts in trademark cases

Article 45 of TRIPS enjoins national laws to provide for damages that are adequate to compensate the right holders. The damages granted in a trademark infringement case are delictual in nature and aim at compensating the owner of the right for his patrimonial loss sustained through the infringement. See *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) 471. According to Cornish and Llewelyn (2003) the regular aim of an award of damages is to compensate the plaintiff for the harm and or injury caused by the defendant without any justifiable cause. The damages seeks to put the right holder in the position he would have occupied had the damage not been caused. Lord Wilberforce put it succinctly in the case of *General Tyre & Rubber Co v Fire Firestone Tyre & Rubber* [1976] RPC 197 (CA) 214 where he said that; "the measure of damages is to be as far as possible, that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong". The aim of the damages is not to punish the defendant but to restore the victim to the position he would have occupied but for the wrong. This is not a simple exercise and the courts have grappled with this question in a number of cases in Zimbabwe.

It is the duty of the plaintiff to adduce evidence to show his loss and the court in turn has to assess and grant damages if loss or injury is proved. In many instances the measure of damages is the loss of profits the owner has sustained in respect of the infringing articles he could and would have made and sold. The courts sometimes use the notional royalty that could have been paid if there was a licence agreement as the starting point in ascertaining the damages due to the plaintiff. In an attempt to assist the courts in assessing damages better some legislatures in some countries have resorted to pegging pre-estimated damages in statutes. No statutory or pre-estimated damages are provided for in Zimbabwe. The Trademark Act (26:04) now allows a court to award additional damages if the defendant flagrantly infringed the rights of the right holder. The provision lacks precision on the formula that the courts can use in awarding such damages. This is

a major drawback. A simple formula like one providing that a court may award damages which are three times the value of the infringement could have helped.

Conclusion

Zimbabwe has a number of relevant and necessary intellectual property legislations that can be used to protect and advance the rights of right holders of trademark rights. There are an adequate array of laws dealing with both industrial property and other intellectual property branches of the law. The challenge lies in the enforcement of these laws by the right holders, the public, the courts and other players in the intellectual property enforcement ecosystem. A number of steps can be taken to improve the situation. These include amending section 9(3) (a) of the Trademarks Act (Chapter 26:04) by providing a simple formula for calculating the damages like 'three times the benefit obtained', strengthening the intellectual property division of the High Court c and requiring certain court decisions dealing with trademark rights and intellectual property rights in general to be given prominent publication in the press, judicial websites and other forums. There is need for trained judicial officials to whom technical cases can be diverted for hearing whenever they arise. To that end the operationalisation of the Intellectual Property Tribunal as a division of the High Court was necessary and timely. It has to be applauded. . It is noted that the fight against infringement, counterfeiting and piracy can be won if all stakeholders take a coordinated approach. To this end national coordination and cooperation of various stakeholders is essential. Right holders may for example assist in the funding of training of the enforcing agencies such as the police and Customs officials to identify counterfeit and infringing products in the market.

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MAKING SENSE OF INTELLECTUAL PROPERTY INTEGRATION IN PUBLIC POLICY IN THE ERA OF NEW PUBLIC MANAGEMENT AND GLOBALISATION: THE CASE OF MALAWI AND ZAMBIA

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Abstract

A well-balanced intellectual property (IP) policy regime has the potential to help nations better deal with complex social, cultural and economic challenges facing them. However, for IP to produce desired results, a particular country's context ought to be taken into consideration when integrating IP in its public policy. The reason is that in policy making, one-size-fits-all blueprints rarely work. Two contexts, namely New Public Management (NPM) and Globalisation, are of particular importance when integrating IP in public policy. These contexts present nations with a set of opportunities which requires IP to exploit, as well as a litany of wicked problems which require IP to counter. This article is a summary of studies conducted in 2014 and 2018, examining the extent to which public policy making in Malawi and Zambia takes into account the dictates of NPM and Globalisation when integrating IP at the policy formulation and decision-making stages. The findings demonstrated that though Malawi and Zambia have always put great effort in integrating IP in their public policies, results on the ground give the lie to the sweat, and this is largely attributed to the two countries' tendency to neglect the role of contexts of NPM and Globalisation when integrating IP in their policy making. As for the current state of IP in the two neighbouring countries, the article makes an attempt through desk research to establish whether, nearly five years after those findings, any policy learning has taken place in these countries on the power of context in IP integration.

Keywords

globalisation, integration, New Public Management, policy myopia, wicked problems

Introduction

Twenty-first century policy world stresses policymaking that is based on "a better understanding of country and reform contexts" (World Bank, 2007, p. 33). In the words of the Office of the First Minister and Deputy First Minister in Northern

Ireland, "fuller understanding of the broader context within which policy works should help policy-makers both when thinking about possible approaches to tackling a given problem and when they come to consider putting a particular solution into effect" (A Practical Guide to Policy Making in Northern Ireland, n.d., p. 9).

With this understanding, a study was conducted in 2014 to examine the extent to which Malawi and Zambia take into account the importance of context when integrating IP in their public policy. By Intellectual Property, this discussion refers to an area of law or a field of study "which concerns legal rights associated with creative effort or commercial reputation and goodwill on such subject matter as literary and artistic works, films, computer programs, inventions, designs, marks used by traders for their goods and services" (Bainbridge, 2009, p. 3).

Two contexts -New Public Management and Globalisation -were of interest in the study because they offer nations unique opportunities and challenges which call for a robust IP public policy regime. Such a regime has the potential to exploit the opportunities presented; it can also be used as a strategy to counter concomitant challenges of NPM and Globalisation.

Objectives of the Study

Specifically the study was conducted to:

1. establish the baseline in terms of level of awareness of IP in the two countries.
2. establish the extent of integration of IP in existing public policy documents.
3. establish the presence in existing public documents of indicators that demonstrate the level of attention given to factors of NPM and Globalisation at the policy formulation and decision-making stages, and
4. assess the recent progress made on integration of IP in public policy in the two countries.

Methodology

The study took a case study approach. The use of a case study was necessitated by the nature of inquiry, investigating a particular contemporary phenomenon, namely integration of Intellectual Property in public policy, and this was within the real policy context of Malawi and Zambia. A total of 100 questionnaires were sent to respondents identified through purposive sampling in Malawi and Zambia. Only 27 questionnaires were returned filled, straight away raising enormous doubts on validity. However, this issue was addressed through desk research which supplemented and gave validity to the questionnaire technique

employed. The desk research was also used as a separate research technique for content analysis, or the "method of collecting and analysing data which aims to find and interpret patterns from contents . . . textbooks, essays, newspapers, magazine articles, speeches . . . " (Fraenkel and Wallen, 2008, p. 472).

The study used the qualitative method.

Findings

The context of NPM was chosen because this philosophy of running the public sector was adopted in the two countries in the 1980s as a solution to mind-blowing problems that had hit the two nations in the 1970s. NPM thus represents an innovative approach to the provision of high quality goods and services, which is the core function of the public sector. The research was premised on an understanding that any government that adopted such an innovative approach to running the public sector should have put in place a robust IP mechanism to help it achieve its goals.

In choosing the complex context of Globalisation, the research was informed by an understanding that a system of forces global in scale, "one that was breaking down national and sectoral constraints on the circulation of commodities and capital, creating one interdependent market and production unit" (Cole, 2003, p. 323 citing Veltmeyer, 2001) would play an important role in any evidence-based policy making. According to Simmons (2015), evidence is crucial in better policy making because it is a powerful tool for defining issues to which policy should attend.

Level of awareness of IP in Malawi and Zambia

First, the research sought to establish the baseline in terms of level of awareness of IP in Malawi and Zambia, including the level of availability of IP literature in the two countries.

The research established evidence that the two countries have very weak IP awareness-raising strategies. In some cases, respondents doing jobs within the ambit of IP, for example in universities and consumer protection organisations, were clueless on how their jobs link with IP.

As for the availability of IP literature in the two countries, the scanty literature available tended to discuss issues common, for example, what their nations were doing to entrench IP in their public policies. Moreover, the greater part of such literature was from law students at the two countries' respective schools of law.

Extent of integration of IP in existing public policy documents

The study also sought to establish the extent of integration of IP in existing public policy documents. Four policy documents for each country were analysed, details of which are given in Table 1.

Table 1: Public policy documents analysed for integration of IP

Set	Country	Public Policy Document analysed	Focus of analysis
1	Malawi	Public Enterprises (Privatisation) Act, 1996	Inclusion of IP issues Inclusion of Globalisation
	Zambia	Privatisation Act, 1996	Inclusion of IP issues Inclusion of Globalisation
2	Malawi	Public-Private Partnership Act 2010	Inclusion of IP issues Inclusion of Globalisation
	Zambia	Public-Private Partnership Act 2009	Inclusion of IP issues Inclusion of Globalisation
3	Malawi	Public Procurement Bid	Inclusion of IP issues Inclusion of Globalisation
	Zambia	Public Procurement Bid	Inclusion of IP issues Inclusion of Globalisation
4	Malawi	University of Malawi Strategic Plan (2012-2017)	Inclusion of IP issues Inclusion of Globalisation
	Zambia	University of Zambia Strategic Plan (2013-2017)	Inclusion of IP issues Inclusion of Globalisation

In set 1, the Malawi Privatisation Act, 1996 mentions IP in the definition of property using a phrase "chose in action". It also supports confidential information. However, knowledge of IP is no criteria for membership in the Privatisation Commission. On Globalisation, the Act is not explicit though it talks of increased competition. Likewise, the Zambian Privatisation Act, 1996 includes "chose in action" and "goodwill" in the definition of property. However membership to Privatisation Agency makes no mention of IP knowledge as a prerequisite. Besides, it focuses on tangible assets; it does not say anything on valuation of intangible assets. On Globalisation, it talks of incentives to foreign investors who "will promote export market, or business of global link or will necessitate technology" though it is not explicit on serious consideration of global factors.

In set 2, the Malawi Public-Private Partnership Act 2010 mentions contribution of "know-how" as part of its objectives. Property includes "chose in action". However, knowledge of IP is no criterion for membership to Public-Private Partnership Commission (though engineering is). The Act is not clear on valuation of intangible assets. On Globalisation, it encourages competition but seeks to reduce monopoly in the economy. Thus, it carries some elements of both IP and Globalisation. The Zambian Public-Private Partnership however mentions IP by word. It recognises IP in trade, use of trade secret and other exclusive rights. However, it does not give clear direction on valuation of IP as intangible asset. On Globalisation, it encourages competition but cushions local businesses through Citizens Economic Empowerment Act, 2006.

As for set 3, public procurement bid documents from both countries have provisions for protection of patents and copyright. This indicates some recognition of IP. Similarly, they both have provisions to open trade to any firm from anywhere except under United Nations embargo, an acknowledgment of the context of Globalisation.

Under the subject of research, the University of Malawi Strategic Plan (2012-2017) (see set 4) makes mention of sharing of technologies and innovation and also developing of IP rights framework. The problems however is that it places innovation under "entrepreneurship" besides putting IP Policy as a subset of Consultancy Policy. On Globalisation, it encourages "thinking globally". It also recognises knowledge as yardstick for values of twenty-first century nation. In the University of Zambia Strategic Plan (2013-2017), core values include "innovativeness" and "search for new knowledge". Besides, Strategic Direction 7 emphasises promotion of ICTs. Things take a strange twist however when it places IP under the theme of academic freedom. On Globalisation, the Strategic Plan talks of "Zambia in a competitive era whose opportunities can be exploited". It also recognises opportunities of a liberalised economy and knowledge generation.

Integration of NPM and Globalisationat the policy formulation and decision-making stages

The study also sought to establish presence in existing public documents of indicators that demonstrate the level of attention that had been given to factors of NPM and Globalisationat the policy formulation and decision-making stages. As presented in Table 2, National IP Policies and National ICT Policies for the two countries were analysed to establish the extent to which the developers of these documents had taken into account the question of NPM and Globalisation.

Table 2: Public policy documents analysed for integration of NPM and Globalisation

Set	Country	Public Policy Document analysed	Focus of analysis
1	Malawi	Malawi National IP Policy (2011 Draft)	Inclusion of issues of NPM Inclusion of Globalisation
	Zambia	Zambia National IP Policy 2009	Inclusion of issues of NPM Inclusion of Globalisation
2	Malawi	Malawi National ICT Policy	Inclusion of issues of NPM Inclusion of Globalisation
	Zambia	Zambia National ICT Policy	Inclusion of issues of NPM Inclusion of Globalisation

The Malawi National IP Policy 2011 (Draft) makes no mention of the complex challenges posed by the era of austerity or New Public Management despite the fact that IP is supposed to offer solutions to numerous challenges NPM brings in the public sector. IP is portrayed as a solution to challenges of Globalisation. However, though it links IP Policy with SMEs, it does not portray Globalisation as a force behind the need for more IP in SMEs. It also fails to link clearly the connection between problem of increased piracy and spread of counterfeit goods with Globalisation. In the Zambia National IP Policy, the question of NPM is never mentioned at all although Globalisation is acknowledged especially as regard E-Commerce. Nonetheless, even Globalisation itself is not presented with sufficient clarity in the Policy.

The Malawi National ICT Policy outlines issues of E-Government (a form of NPM) but provides no link between E-Government and NPM as context. It also talks of implementation through the public-private partnership arrangement (a form of NPM). It also presents (indirectly though) commercialisation which is a component of NPM. On Globalisation, it makes mention of creation of information society, knowledge-based economy and use of universal network, all of which are components of Globalisation. Lastly, the Zambia National ICT Policy hails the presence of the public-private partnership (a form of NPM) on the question of its implementation. It also provides guidelines to E-Government (a form of NPM), and talks of competition, the liberalised economy, private sector participation, innovation and R&D. On Globalisation, it talks of the global economy, information and knowledge society, e-commerce, and removal of barriers of time and space by the phenomenon of Globalisation.

Discussion of Findings

The following section discusses what these findings suggest in relation to integration of IP in public policy in the two countries. In doing this, the importance of IP shall be given.

Importance of intellectual property

It should be said again that all the public documents analysed in the 2014 study are a form of public policy instruments. In this way, they manifest or reveal factors that had been considered at the time the documents were being developed.

The general pattern established is that documents which provide guidelines on New Public Management (Privatisation Acts and Public-Private Partnership Acts from both countries) do not seriously incorporate IP issues, though IP could form an important component in privatisation and public-private partnership through assessing values of intangible assets and transfer of technology. Consequently, privatisation failed to produce desired results in both countries. In fact, the Government of Zambia conceded that privatisation has been pursued at "a slower pace" (National Report Zambia, 2012, p. 40).

Similarly, IP documents or those documents on subjects having a bearing on IP have been seen to have glossed over issues of NPM and Globalisation. Had IP documents, for example, National IP Policies provided a clear link between IP on the one hand, and NPM and Globalisation on the other, this study would have concluded that policy making in the two countries take into account the contexts on NPM and Globalisation when integrating IP.

The analysis has also demonstrated that Malawi has a rather weak IP policy integration mechanism in comparison to Zambia's. Interestingly, Di Lorenzo (2013) ranks Zambia 112 (out of 131 countries) with a score of 3.7, and Malawi 84 with a score of 4.7. The findings of this study failed to pin-point a feasible justification in ranking Malawi's IP activities above Zambia's.

Policy making in Malawi and Zambia would have been producing desired results had policy-makers understood the link between NPM, Globalisation and IP. The following section provides this link.

According to Christensen and Fan (2016), reforms based on the New Public Management ideology or philosophy trace their origins in the Anglo-Saxon nations in the early 1980s. The two authors observe further that this ideology was a response to economic crises of the 1970s and public administration failures in the 1970s. In the policy world, these crises plus the huge public sector disappointments of the time came to be described as wicked problems. Apart from economic crisis, other examples of wicked problems include what Owen

(2018, p. 76) describes as the crowded global health context of HIV and AIDS, Ebola, influenza, cancer, diabetes, obesity and Zika. Ney and Verweij (2015) observe that two planning experts, Horst Rittel and Melvin Webber, were the brains behind the term 'wicked' in 1973, describing mind-blowing problems facing decision-makers at the time.

Wicked problems are so elusive that "at first sight, grappling with wicked problems might seem like taking up lost causes" (Head and Alford, 2015, p. 712,). Daviter (2017, p. 4) proffers an accurate presentation of wicked problems, namely that:

> Wicked problems lack a single root cause or clear point of origin. Both causes and symptoms of the problem are connected to a plethora of interdependent factors. They are interconnected problems constellations, rather than easily identifiable single issues. Problem boundaries are diffused, and problems are difficult to scope and delineate from neighbouring problems. The contours of the problem and the pattern of its constituent components change over time in ways that are poorly understood and with effects that are difficult or impossible to predict.

According to Head and Alford (2015), in the 1970s and 1980s, governments thought that part of the solution to wicked problems was to reduce the role of the state in provision of goods and services and also to lower the people's expectations of what government was able to deliver. This is in tandem with the NPM philosophy where the role of the state in public goods and service provision was reduced through surrendering ownership to the private sector and through devolving power and authority to the subnational level, a process known as decentralisation.

The countries in crisis also resorted to borrowing especially from the World Bank and the International Monetary Fund (IMF). Zambia, for instance, entered its first stabilisation agreement with the IMF in 1975. Although faced by the same crises, Japan resorted to more innovation (see discussion on The Importance of Oil in World Trade (available from: www.palgrave.com). This suggests that if Zambia and Malawi had incorporated IP in their NPM reforms, their economic status should have been competing with that of Japan. This also demonstrates that when integrating IP in public policy, policy-makers should look at IP as a solution to wicked problems or crises. In this way, every integration should take into account the opportunities and challenges of NPM.

Among the NPM opportunities is the ability for employees to get creative and innovative for superior goods and services. As for the challenges, IP can be used to counter the consequences of NPM, for example, offering the people made redundant with opportunities to engage in medium and small scale enterprises. There is evidence of a strong link between a culture of competition which NPM encourages and IP, as "both aim at dynamic efficiency and the promotion of

innovation and differentiation between alternative goods and services" (Da Silveira and Lacerda, 2017, p. 726).

As for Globalisation, policy-makers can never appreciate the extent of wicked problems if they do not acquaint themselves with it, a term to do with the increased inevitability among nations and societies to becoming one as a result of reduced boundaries and distance resulting from effects of a number of revolutions including Information Technology and Communication (Kegley and Raymond, 2005). The concept of Globalisation was developed by writers such as Giddens (1990) and Robertson (1990) and they "intended to capture increased interconnectedness of different parts of the world" (Hesmondhalgh, 2007, p. 215). Despite such opportunities as technology transfer and E-Business, Globalisation presents the global village with equally immense challenges. According to the Organisation for Economic Co-operation and Development (2007), "Globalisation has made counterfeiting an attractive activity, now extended to all types of goods, with worsening safety, health and security implications in addition to its harmful impact on the propensity to innovate" (p. 3). Among entities most threatened by Globalisation in the developing world are micro small-scale and medium enterprises (MSMEs). According to the World Intellectual Property Organization (2007), small and medium enterprises account for 90 percent of enterprises in most countries, a significant contribution to national economy. Without knowledge of IP, such enterprises can never survive the overwhelming forces of Globalisation.

It has been shown how NPM links with IP and how Globalisation links with IP. Policy-makers should also appreciate how NPM links with Globalisation. This link is that "economic crisis, ICT or telecommunication and Globalisation are said to be the three major forces that have steered governments towards NPM-reform style" (Fatile and Adejuwon, 2010, p. 149). Both then link with IP in that "changes in the global economic environment have influenced the development of business models where IP is a central element establishing value and potential growth" (pg. 14. Therefore only policy myopia can explain any effort to integrate IP without taking into account the relationship between NPM and Globalisation on the one hand, and IP in the other. And by policy myopia, this article refers to policy failure that results from failure to properly diagnose the boundaries and degree of uncertainties to the extent that the policy-makers are focused more on the uncertainties in the short term than in the long term or both (Nair and Howlett, 2017).

Progress since the Research

A follow up study was conducted in 2018 to assess whether there have been positive developments in integration of IP in public policy in the two countries since the research was conducted. To do this, this article measures the extent to

which current public sector reforms in Malawi and Zambia have embraced IP, and also considers the number of pieces of legislation on IP the two countries have passed since then.

Currently, the Malawi public sector is undergoing the most ambitious of reforms. The blue-print for these reforms is a report, Public Service Reforms: Making Malawi Work, launched in February 2015. Intellectual Property does not feature highly in this Report. For example, the Report talks about "creation of a one-stop centre for investment at Malawi Investment and Trade Centre", "improving signage and outlook in government offices", "embracing information technology as a means of improving efficiencies and modernisation" and "promoting SMEs", all of which sub-sets of IP yet nowhere in this important document is IP mentioned by name.

Zambia is also implementing public sector reforms through the Public Service Reform Programme which was launched in 1993. In a research to establish whether the NPM reforms there have had any influence on service delivery in the public sector, Mulimbika, de Waal and Goedegebuure (2015) found that two statutory institutions under the Ministry of Commerce, Trade and Industry, were still low in adopting the commercialisation process and information technology. Coincidentally, the two, Patents and Companies Registration Agency (PACRA) and the Zambia Development Agency (ZDA), are leading institutions on issues of IP there. This could suggest that not much has changed on integration of IP in the public sector in Zambia. The same could be said of Malawi where the blue-print of public sector reforms fails by a wide mark to reflect level of engagement with IP.

This weakness is also evident in the two countries' development strategies. In Malawi, content analysis of the Malawi Growth and Development Strategy (MGDS) III (2017-2022) launched in March this year, reveals that IP is mentioned only twice in the entire document, and this, despite the fact that IP had been mentioned ten times in its predecessor document, the MGDS II (2011-2016). Likewise, content analysis of the Zambia Seventh Development Plan (2017-2021), launched in June 2017, shows IP being mentioned only once.

If one can use the number of pieces of legislation on IP to measure the degree of integration of IP in public policy, the picture could be rosy for Zambia. First, Malawi still does not have a National IP Policy except in draft form since 2011. Zambia, on the other hand, adopted theirs in 2010.

The case of the Malawi National IP Policy eludes explanation. Between 2009 and 2012, the African Technology Policy Study (ATPS) Network in partnership with Biotechnology Trust Africa (BTA) implemented a project aimed at strengthening national IP Policy and legal frameworks for Traditional Knowledge (TK), Access and Benefit Sharing (ABS) in eight countries in Africa, among which was Malawi (ATPS, 2013, p. 7). Five years down the line, Malawi is yet to adopt its National IP

Policy let alone a legislation framework on TK and ABS. In the same period Zambia has adopted the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act (No 16 of 2015).

Zambia boasts the Layout Designs of Integrated Circuit Act (No. 6 of 2016), and has since replaced two of its archaic IP laws on patents and industrial designs through the Patents Act (No. 40 of 2016) and the Industrial Designs Act (No. 22 of 2016). Eight years ago, Zambia had also replaced its copyright law by the Copyright and Performance (Amendment) Act of 2010. In the case of Malawi, the country has since replaced its 1989 Copyright Act with the Copyright Act of 2016. Recently, it has also passed the Trademarks Act (No. 2 of 2018).

Based on these findings, it can be said that there is great progress in terms of legislation on IP in the two countries. However, the hurdle could be on implementation. Booth et al. (2006), bemoaned this tendency when they observed that Malawi has one of the highest concentrations of policy documents per unit area in Africa which are not adequately implemented.

Conclusion

This article has summarised the research the Author had conducted in 2014 on the extent to which policy making in Malawi and Zambia take into account contexts of New Public Management and Globalisation. The research established that the little regard policy-makers give to contexts of New Public Management and Globalisation has tended to breed policy myopia at the expense of strategic integration in policy making. The article challenges policy-makers in the two countries to go back to the drawing board and add a component of contexts of New Public Management and Globalisation in policy-making or risk policy failure.

Recommendations

The study concluded that the level of integration of IP in policy making in Malawi and Zambia is discouragingly low. The reason is that policy-makers have tended to neglect the power of the contexts of NPM and Globalisation when integrating IP in public policy.

It is therefore recommended that national IP offices be re-organised to contain a mix of policy representation. This recommendation is premised on the fact that, after 2010, IP in Zambia has registered successes more than in Malawi because of the central role the Zambian law gives the Patents and Companies Registration Agency (PACRA). In Zambia, the PACRA Board has, among others, a

representation from Ministry of Commerce, Trade and Industry, from the office of Attorney-General, and one person with expertise in IP.

In this regard, research ought to be conducted to determine whether Malawi would have registered similar successes as Zambia had it adopted a similar arrangement. In Malawi, Industrial Property is under the Department of Registrar General in the Ministry of Justice and Constitutional Affairs. It is further recommended that this arrangement serves best short-term objectives such as drawing of pieces of legislation. A wide representation that would include IP experts from the public policy world would perhaps ignite strategic thinking in IP policy making in Malawi.

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CHARACTERISATION OF UNIQUE AGRI-FOOD PRODUCTS FOR GEOGRAPHICAL INDICATIONS PROTECTION POTENTIAL IN KENYA AND SCOPE FOR UP-SCALING

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Abstract

Sustained growth in Kenya's agricultural sector is the main driver of economic development hence the focus of the sector as one of the key economic pillars in the Vision 2030 and the Agricultural Sector Development Strategies. Diversification through protecting products using geographical indications (GIs) is an opportunity for increasing rural incomes. A scoping study was conducted as a first step towards identifying Kenyan origin products that have potential to be registered as GIs. Before identifying the products, a selection criterion was developed from literature and interaction with key informants. Potential products and their production regions were then identified based on the perceived uniqueness from similar products from different production regions. Eleven products were identified, namely tea, coffee, apple and ngowe mangoes, oranges, avocadoes, pyrethrum, koriema goats, tilapia from Busia, Baobab and wild silk. Relevant stakeholders were identified with help from key informants in the different sub-sectors. The informants were interviewed either individually or through focus group discussion comprising of producers and few traders. Traders in the urban markets were also interviewed. Each product was then subjected to the selection criteria developed. From the criteria, tea, koriema goats, coffee, tilapia fish and Makueni apple mangoes were ranked highest. The criteria provide a combination of factors to consider, in establishing the potential success of GI protection. The analysis points to the relevance of future research on the quality of origin products and institutional regimes for geographical indications in Kenya.

Keywords

characterisation, geographical indication potential, selection criteria, weighted score

Introduction

Evidence of consumers increased knowledge and demand for origin-labelled products has led to increase in increased interest and supply of products with potential for geographical indication (GI) registration, the world over. Successful GIs have often been associated with sustained agricultural growth and value addition. These goals double as the focus by the Government of Kenya (GoK) through improving income, equity and environmental protection in the rural areas (GoK, 2007, 2010).

According to Dagne (2015), where economies are highly dependent on agriculture, they stand to benefit from protecting products whose unique qualities are essentially due to the geographical region of production, rather than trade them as standard goods. Whether sold in domestic or export markets, the author indicates that, successfully applied, GI protection can result in accrued local economic and environmental benefits and producers can reap the benefits accruing from consumer demand (Bramley, Kirsten 2007). The Article 22 of the TRIPS Agreement has given a universal definition of GIs and required the World Trade Organisation (WTO) member countries to provide the legal framework for their protection. Each country is hence responsible to develop their own guidelines based on the products that are unique essentially and exclusively due to the region of production. In Kenya, protection of GIs, can be achieved through registration as collective marks under the Trademarks Act CAP 506 (GoK, 2012). Whereas the features of Collective marks are quite similar to geographical indications, the former do not provide regulatory framework for the GI protection. The marks however are a good starting point for producers to consider protecting their products as GIs later. To provide the framework and pave way for implementation policies for geographical indications, the Kenya Industrial Property Institute (KIPI) together with relevant stakeholders have developed the drafting instructions for a GI bill, the enactment of which is yet to be done.

However, as Aubard (2012) and Giovannucci et al. (2009) point out, GI is not a panacea. The fact that a product has unique qualities essentially attributable to the geographical region of production does not necessarily mean that marketing it as a GI will automatically be successful in improving producer income, equity or even environmental protection (Kerr, 2006). There is therefore need to justify any potential investment in GI protection by assessing identified unique products against a criteria that goes beyond commercial and legal instruments. The assessment is based on the tenet that the country has an untapped potential to value and market their origin products based on unique and specific regional/geographical characteristics, which would result in better income for the producers as well as better management of the environment and increased social inclusion.

Previous studies have already identified some agri-food products that have potential to be protected as GIs in the country. However, most of these studies did not report use of any criteria that could be adapted for replication in similar studies. The objective of this study was to identify, using a set of predetermined criteria, unique characteristics of agricultural products that would inform potential for protection as GIs as well as the scope for up-scaling. The study uses a set of selection criteria developed from literature to rank the agricultural products. This provides a means to identify products for further analysis since not all origin-based products have the potential to benefit from GI labelling, protection and marketing (Bramley and Biénabe, 2013; Fredskild, 2014; Musungu, 2008).

Methodology

How the study was conducted

A first detailed interview was held with the patenting office of the Kenya Industrial Property Institute (KIPI). This gave an initial status of the legislation as well as any existing initiatives toward identification of potential GI products. Literature review and interviews with relevant stakeholders in the agricultural sector were the main sources of primary and secondary data for the characterisation study. Interviewees included key informants and experts in the respective value chains, comprising of government officials, traders, key producers and other relevant stakeholders with relevant information, identified through snowballing. In each study region, at least two focus group discussions were held with producers. The interviews helped identify products that have unique qualities essentially linked to the geographical region of production. Checklists guided the discussion in line with the objective of the study.

Developing and defining the identification criteria

The process of developing and defining the identification criteria were based on literature sources as well as the interaction with the KIPI staff. The process resulted in eight identification criteria against which unique place-based products were assessed for their potential to be registered and marketed as GIs:

a) Reputation – Reputation forms the basis of a GI supply chain as it transforms cultural surplus value of a product into an economic surplus value as cited by Bramley and Biénabe (2013) and Belletti (2000). Reputation arises from the recognition of a product's unique characteristics/quality in the market and consumer perceptions centred on their cumulative previous experience. Giovannucci et al (2009) indicate that a product's reputation can be at local, national or international levels.

b) Specificity and typicity – specificity refers to specific product characteristics inherent to the place of production that give the product its reputation among consumers '(Belletti, Marescotti and Touzard, 2017;

Giovannucci, Josling, Kerr, OConnor andYeung, 2009). This differentiates the product from similar ones produced outside the region. Specificity leads to a products reputation. Besides having a specific quality, the combination of human and natural factors anchored in the territory of production gives the product uniqueness, referred to as typicity. This links to the definition of GI that the products characteristics are essentially attributable to the *terroir (Bramley and Biénabe, 2013; Giovannucci et al., 2009; Vandecandelaere, Arfini, Belletti and Marescotti, 2010; WIPO, 2003)*.

c) Environmental impact – The current and possible future changes in environmental impact of production are important in the sustainability of a potential GI. A positive environmental association with protection of a product as a GI affects both the reputation of the product as well as consumer. GIs also provide an opportunity to protect the environmental landscape that makes up the product qualities (Bramley and Biénabe, 2013; Giovannucci et al., 2009; Vandecandelaere et al., 2010).

d) Cultural aspects and linkages (Belletti et al., 2017; Dagne, 2015) – Often GIs are strengthened by the link between the geographical region characteristics and the use of traditional knowledge and locally specific resources (the combination of climate, soil types, indigenous plant varieties/animal species) (Belletti et al., 2017). GI protection can provide protection for traditional knowledge on which a product quality is hinged, while the cultural associations would strengthen the local landscape of a community (Belletti et al., 2017; Dagne, 2015; Vandecandelaere et al., 2010).

e) Premium price – Whereas this would be an outcome of a GI registration, there are instances where consumers already pay a premium price for the unique characteristic of a product. Differentiating a product through GI registration can be used as a tool for fair redistribution of any premium income or added value among the suppliers and especially the producers (Vandecandelaere et al., 2010). Often producers do not receive the premium price due to their lack of bargaining power in the supply chain. In other instances, the intrinsic characteristics of some products (e.g. shelf life) do influence the magnitude of the premium price (Oana, Costanigro, Monteiro and McFadden, 2011).

f) Collective rights and coordinating institutions – Whereas producers are independent in their economic and legal aspects of production and marketing, they are linked together by their activities and common product, providing for collective reputation. Various authors envisage collective action and coordination in the supply chain as a prerequisite for success in differentiating origin products (Barjolle and Sylvander, 2002; Bramley and Biénabe, 2013; Reviron and Chappuis, 2011). Poor coordination of the collective reputation can result in its misuse both within and outside the region (Vandecandelaere et al., 2010).

g) Organisational and institutional support (including macro institutional support) – In some sub-sectors, the smallholder producers may be

unfamiliar with various legal and market concepts that affect them. The presence, role and influence of the existing value chain actors and their specific roles and influence will have a bearing on the outcome of protection of a product as GI. The support provided to producers could be the provision of regulatory framework, financial contribution, assistance with registration and enforcement procedures, among others (Bramley and Kirsten, 2007).

h) Market attractiveness, scope and supply chain characteristics (Barjolle and Sylvander, 2002; Bramley and Biénabe, 2013; Bramley and Kirsten, 2007) – Beyond reputation, there should be an indication of market demand for the attributes as well as the potential for establishment and growth of the niche GI market. Market attractiveness emphasizes that the image of the production region should boost the value of the potential GI product and vice versa, the GI product should reinforce the region's image (Barjolle and Sylvander, 2002; Bramley and Biénabe, 2013). Supply chain characteristics spell out the degree of competition, barriers to entry, the structure of the patterns away from production and the scope of the market (is it local, or goes beyond national boundaries) (Bramley and Biénabe, 2013).

Each criterion was given a weight based on its relative importance in identifying a product as a potential GI. Criteria based on the reputation, specificity, environmental impact and cultural links were given a weight of two (2) while the rest were given a weight of one (1). Those with a weight of two are necessary while those with a weight of one are important but not disqualifying.

The selection criterion was then developed and adapted for the study as summarized below:

Criteria	**Score**	**How scoring was done**
1. Reputation ***(2)***	0 – 20	– No product reputation; 1 – Product reputation is implied and not necessarily linked to product characteristics 2 – There is clear link between consumers reputation of product and geographical region
2. Specificity/Uniqueness – linked to demand ***(2)***	0 – 20	– There is no clear link between product reputation and specific region of production 1 – The link between product unique qualities and region of production is implied but not verifiable 2 – There is a clear and known link between the product unique qualities and region of production
3. Environmental impact	0 – 20	– Production of the unique product

and sustainability ***(2)***		negatively impacts the environment 2 – There is a strong linkage between producing the unique product and its sustainability
4. Cultural aspects embedded in the product ***(2)***	0 – 10	– There are no cultural linkages associated with production or processing of product 1 – There are cultural linkages associated with production or processing of product
5. Premium price ***(1)***	0 – 20	– Premium price does not exist currently for product qualities 1 – Consumers pay a higher price for the product 2 – Consumers pay a premium price for the product characteristics
6. Collective action and institutions	10 – 20	– Producers do not exhibit any collective action in production and marketing of product 1 – Producers engage in collective action but only in part 2 – There is clear collective action in production and/or marketing of the product
7. Macro organisation and institution support	10 – 20	– There is no organisational support for the product 2 – The product has strong macro-institutional support which can help with GI registration
8. Market attractiveness, supply chain characteristics	11 – 33	– Image of region boosts the value of potential GI; supply chain encourages and scope producer-market linkages and a clear market is available that can be differentiated either locally or internationally; 2 – Has at least two strong characteristics compared to 3 above 1 – Market attractiveness, supply chain characteristics and scope of market are not evident or low

Results and Discussion

The results are presented in two sub-sections. The first sub-section presents the identified products while the second applies the identification criteria on each of the products. A summary is then given on the scoring of each product against the criteria.

General description of the potential GI products

From literature, various initiatives including the Kenya-Swiss project (IPI and KIPI, 2009), Ramba (2013), (Blakeney and Mengistie, 2012) and Bagal et al. (2013) among others show that there are products with potential to be protected as GIs in Kenya. Bagal et al. (2013) and Gichovi (2011) focus specifically on coffee, Blakeney and Mengistie (2012) on Tea while the IPI and KIPI study lists more products, including non-agricultural ones. Whereas some of the products with potential including tea and coffee are largely produced for export, other products mainly target the local and regional markets. Major stakeholders who have local knowledge and interest in the success of regional and local products include the Counties and their administrations and political leadership Governors and sectoral producer representatives/commodity boards, where they exist. At least eleven products were identified that could have uniqueness that is essentially due to the geographical region of production in Kenya (Figure 1).

Though grown in different regions in the country, only specific regions were visited based on information received from expert interviews and literature search. The regions visited are those where the identified products were perceived to have unique characteristics.

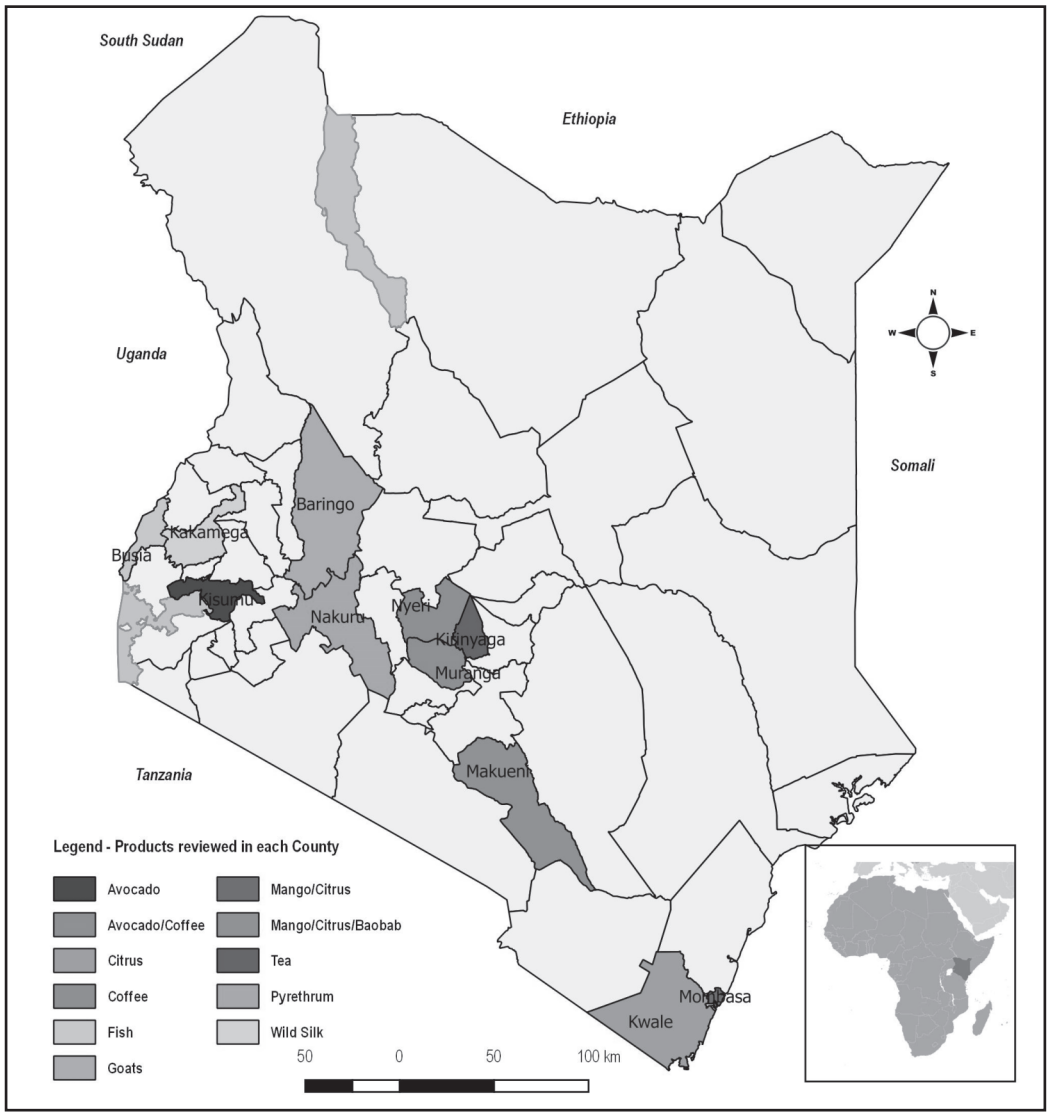


Figure 1: Map of Kenya showing unique products reviewed in different counties

Application of the identification criteria

Checklists were used during the interviews, and respondents were asked if they were aware of the concepts of GIs and/or origin products (OP). The majority of respondents were not aware of the terms neither the draft bill. However, when the concept was explained, the respondents were able to describe the products and their place-based uniqueness based on their perceptions, as described in this section.

Each of the identified potential GI products is described based on the identification criteria. At the end of the entire section, a joint summary of all

products is given and a scoring and ranking of the attributes done to identify products for further research.

Tea as a potential GI

Tea was identified as a potential GI due to the reports and perceptions that Kenyan teas have uniqueness in its taste that leads to increase in demand. Tea is among the most valuable of all exports from the country. Production is practised at altitudes between 1550 and 2200 metres above sea level, often characterised by steep/hilly slopes requiring appropriate management against soil and water erosion. Producers are both small-scale farmers as well as large-scale estates. The Kenya Tea Development Agency (KTDA) manages production, processing and marketing of tea produced by small-scale producers.

At least 90 percent of tea produced in the country is sold on the export market either through the auction in Mombasa or through direct sales to specific specialty buyers. According to practitioners in the industry, specialty market for tea is attributable to the unique tea qualities from different gardens.

Producers and factory personnel in the Mt. Kenya region indicate that quality of tea is dependent on the producers' adherence to good management practices. To ensure uniform and appropriate environmental management, KTDA have developed clear codes of practice, which covers production aspects related to all agricultural enterprises on the tea farmers' fields. The guidelines also include handling of waste at household and community level to ensure that there is sustainable management of the landscape. They also emphasise on timeliness of operations including delivery, handling and processing at the factory, which are cumulatively important in determining the grade of the teacup. Any error in one of the processes in the factory results in poor quality tea in the cup, regardless of the field management practices observed. Therefore, tea quality is a product of the efforts of different supply chain actors.

Fertilizer is the only inorganic additive in the entire tea production and processing cycle. However, regardless of similar management procedures (both field and factory) under small-scale production, the KTDA and the Tea directorate have, based on feedback from the demand-side, appreciated that teas produced in different geographical regions have different taste and body attributes. This difference is especially evident among various consumers who purchase teas from specific gardens (factories) at different prices. Teas from Mt. Kenya region, for example, have consistently attracted the highest prices per kilogram, nationally, indicating that there is more to the quality than timeliness of operations and good management. This difference in the quality of the teacup is distinct East and West of the Rift Valley in terms of taste, body and colour, irrespective of management practices. The Tea Directorate and other stakeholders are in the process of analysing and classifying these distinct qualities into well-defined tea zones.

Each factory comprises several buying-centres for ease of management and collection of the tea leaves. Each producer can only deliver tealeaves to a specific buying centre where they are registered; hence, tea can be traced back to a group of producers, who in turn provide quality check in the field management. At the buying-centre, farmer-led committees enforce hygiene and safety standards. The factory boards include producer representatives, who participate in decision-making regarding finances and other management issues.

Sorting of tea is done at the buying centre. Grading is done at the factory and the final products delivered to the auction or sold at factory door to local consumers and traders. Each factory, referred to as a garden, sells its tea separately. Therefore, tea quality is a joint outcome of producers and factory processes with buyers associating specific tea qualities with different factories.

Coffee as a potential GI

Identification of coffee as a potential GI was based on literature, efforts by the Coffee Directorate to develop the Coffee Mark of Origin, as well as interviews with various stakeholders within and outside the coffee sub-sector.

The Coffee Research Institute (CRI) classifies coffee production regions in Kenya into at least five distinct production zones. Within these regions, the high and medium altitude coffees are generally of higher-grade quality compared with those from lower altitude. In addition, taste of the resultant coffee differs according to the regions, but no scientific evidence is available yet on this distinction. Coffee from Mt. Kenya region generally attract higher prices among consumers, and are described as having rich floral tastes (Bagal et al., 2013; François and Gichovi, 2011; Gichovi, 2011). Coffee buyers validated this and described these coffees as having varying and rich floral tastes attracting premium prices from specific consumers.

Producers in Mt. Kenya region indicated that observing good management practices is of critical importance to the quality and grade of the coffee. This is evident from the fact that within the same geographical regions, coffee from different factories attracts different prices at the Nairobi Coffee Exchange. One of the best small scale coffee producers in Nyeri County says: "*if a farmer in a different coffee production region, practices adheres to the laid down coffee production codes of practice in a timely manner, the resulting berries will be similar in similar quality to mine.*"

A technologist at the Dedan Kimathi University of Technology, Nyeri, Kenya described coffee from Nyeri and the bordering Muranga regions as very acidic with a sharp taste. They are characterised by varying distinct floral flavours and the parchment are bold (swell from behind), a desirable quality. This is in contrast to coffees from Aberdare region that are not acidic and the parchment is not bold. The red volcanic soils with high percentage of phosphoric acid favour the quality

and boldness of the Nyeri and Muranga coffees. The high altitude contributes to the high acidic taste.

Small-scale coffee producers are organised into factories, a number of which collectively constitute a Coffee Cooperative Society. Each factory is responsible for wet milling of the berries. The factories have committees whose task is to ensure quality of produced berries through monitoring timeliness of on-farm production practices by the producers as well as timeliness of operations at the factory. However, due to poor performance of the sub-sector over years resulting in low producer prices, many producers either abandon their crop or perform the bare minimum to sustain the crop in the field. The Society rules require the factories to process berries separately based on adherence to on-farm management practices. Some factories do not strictly observe the rule due to low and declining volumes of berries delivered. The result is poor prices for those who manage their coffee crop well and the low prices further aggravate the production and productivity problem. The producers attributed the low investment in management of the crop to the low prices they receive. This is despite having the industry as one that is advanced in terms of differentiating coffees from different regions and factories. Where collective action among producers is passive and inefficient, they have not been able to benefit from these premium prices, which then remain in the hands of the other investors higher up in the supply chain.

According to the Coffee Auction, coffee produced in Kenya is sold mainly in the export market (at least 80 percent) with low, but increasing, local consumption. Bagal et al (2013) describes the Kenyan coffee value chain in detail. Through collective decision-making, the factories select the dry millers and marketers for the parchment coffee. The Coffee Directorate provides regulations that guide deductions made to each segment of this supply chain. The regulations require that producers receive at least 80 percent of the buying price.

Crops Act (2013) managed nationally under the Agriculture and Food Authority (AFA) recognizes both coffee and tea as scheduled crops. The Kenya Coffee Standards developed by the Coffee Directorate (of the AFA) gives the codes of practice on cultivation, processing and packaging. All Arabica coffee produced in the country in accordance to the Kenya Coffee Standards and other codes of practice in the coffee industry is eligible for registration using the Coffee Kenya Mark, which is a certification mark enforced under the KIPI, which acts as a country GI (Melli, 2015). There is a general perception that Kenyan Arabica coffee exhibits production-region related uniqueness and most buyers blend it with other coffees to enhance the qualities. As currently designed, Coffee Kenya does not differentiate coffees from different geographical regions (Melli, 2015) and the impact of the monetary benefits on producers is yet to be quantified.

At the time of the study, coffee production in the Mt. Kenya region varied between producers who received good and stable prices due to well managed crop and

those who received poor and low prices due to poor field and factory management. When producers receive low prices, they compromise on the field management of the crop, and this has resulted in low quality production, unsustainable practices and in other cases, shift from coffee production to other enterprises. This shift has direct effect on current and future coffee production.

Apple mango as a potential GI

The study focused on Apple mangoes from lower Eastern region of Kenya due to consumer and traders' perceptions that the fruits from the region were generally sweeter and juicier. Makueni County is the largest producer of Apple mangoes in the Country, and the lower eastern region in particular, and hence formed the basis of the study.

An interview with traders in high-end green groceries and markets in Nairobi showed that mango prices might differ by season, but rarely by region of production. The prices fluctuate based on volumes and seasonality of production. However, the traders indicated that customers often enquire the geographical source of the mangoes, with most preferring those from lower Eastern region. Due to the preference, the peak season for mango availability is associated with lower Eastern region. The traders in turn sell an assortment of mangoes from different regions during the peak season, benefiting from the lower Eastern mangoes to enhance sales.

According to the State Department of Agriculture officials as well as apple mango producers, a major setback for producers in marketing the fruits, at the time of the study, was the lack of collective action on the supply side. Not all previous efforts at enhancing collective marketing have been successful beyond project cycles and at the time of the study, most of the groups and umbrella bodies were stronger in production aspects as compared to marketing aspects of apple mango. A focused group discussion with apple mango producers in Makueni indicated that collective action often fails due to the high number of buyers (often intermediaries) and mistrust among producers. A processing factory built by the County government is envisaged to enhance not only the marketability of the produce but also collective decision making of the producers. However, the factory may initially focus on production of Ngowe mangoes.

Intermediaries sell the apple mangoes in both the domestic and international markets through exports to the United Arab Emirates. Access to the export market opportunity is conditional on adherence to the set standards. The export market attracts higher prices per piece, with some producers, especially those in Kibwezi, receiving up to 0.5USD (KES.50) per piece. Producers in Kibwezi are able to benefit from an early season crop through irrigation. Export to the European market is limited due to more stringent requirements as well as preference for the gentler tastes of Tommy and Kent mango varieties as opposed to the Apple mango (*Joseph, KALRO Thika, personal communication*). The intermediaries in the

export market are also more likely to be part of the investors, willing to invest their funds to ensure sustainability of the export market.

Intermediaries often purchase the mangoes from the small-scale farmers and deliver them to various markets in major urban regions. The producers are often not able to access these urban markets due to informal barriers to entry set by the traders. The short mango-harvesting season (often three months) and the fact that the fruits are highly perishable expose producers to exploitation by the intermediaries. Due to lack of collective marketing, price setting is mainly done through individual farmer negotiation with the intermediaries.

Fruit trees are generally good for agroforestry and according to Rao et al (2009), soil temperatures are lower where there are trees, especially in semi-arid areas. In Makueni, the producers practice agroforestry with the fruit trees therefore creating a micro-climate that would facilitate production of other adaptable crops.

Ngowe mango as a potential GI

Ngowe is typically a coastal cultivar but also well adapted to mid-altitude zones. Commonly known as Lamu mango, the fruit originated from Zanzibar introduced to Kenya in the late 19th Century (Griesbach, 2005). Mango production in Kenya was traditionally associated with the coastal region, especially due to the presence of the Ngowe mangoes. This long history of production in the region is associated with a number of culinary recipes from mangoes. The County governments and AFA consider the fruit tree an important poverty alleviation and source of income in the region.

Producers perceive the taste of the mango grown in the region to be distinctly tastier compared to those from other Ngowe producing regions. According to two focused group discussions held in Kwale and Mombasa counties, Ngowe mangoes from the coastal region have a unique skin, with an attractive powdery look when held against the sun. Juice processors prefer Ngowe mango due to its large size, thin skin and small seed and high quality pulp, hence little wastage (USAID 2015). The producers and juice makers in Mombasa reiterated this. These characteristics (large size, thin skin, small seed and high quality pulp) and its characteristic unique taste also make it more preferred for juice making compared with apple mango, which is more suitable for eating as a fruit.

Producers in Mombasa and Kwale attributed the unique taste and enhanced colour of the fruit to the early morning breeze from the ocean, the soil as well as temperature and rainfall patterns. However, the taste is also a function of adherence to good management practices. Since most farmers do not practice good management practices, the resulting fruits are often characterised by a bitter taste and infestation by diseases. Poor management is harmful to the environment as the trees can serve as hosts for harmful pests and diseases that may infest other plants in the vicinity (Griesbach, 2003).

According to officials from the then Horticultural Crops Directorate of the Agriculture and Food Authority, collective action is not common among mango producers in the region. As with Makueni County, this lack of collective action complicates mango marketing since the intermediaries, who are the main buyers, capitalise on it and become the price setters, offering producers low prices.

Ngowe mangoes from the Coastal region are mainly sold in the local and national market, with very little going to the export market. The mango can be consumed whole or processed into various products including juices, jam, ice-cream, yogurts, or used as a flavour. Several processing companies including Cocacola and Afia fruit processors, among others, have established in the coastal region to take advantage of the available raw materials. Most of the processors access the fruit from the market or intermediaries. The lack of penetration into the EU market is mainly due to the taste preference. However, as with Apple mango, market for Ngowe mangoes exists in Middle East. The export market from Kenya benefits from the advantage that the mango season in the country coincides with off-peak season of other big exporters like Pakistan and India.

Wild silk from wild silkworm as a potential GI

The *Anaphe panda* silk moth (hereinafter called the Kakamega wild silk moth) is indigenous to Africa and particularly the areas around the Kakamega forest, where the *B. micrantha* tree thrives. Wild silk from other regions in Kenya is a product of different silk moths, since the different silk moth species occur naturally/are adapted to different ecosystems (Raina, Kioko, Gordon and Nyandiga, 2009). Although the wild silkworms occur naturally in Kakamega forest, the only mid-altitude tropical rainforest in the country, it was not until the early 1900s that exploitation of their silk began (Kioko, Raina, Fening, Ngoka, and Mbahin, 2007). Wild silkworms are non-timber forest products, which contribute largely to the preservation of the trees and tree cover. To increase production, the producers have planted the *B. micrantha* tree on their farms, hence increasing tree cover in the region.

In Kakamega, the producers who harvest wild silk allow the natural processes to take place in the wild. The silk moth feeds on the leaves of the *B. micrantha* tree, which occur naturally especially in the forest area, or grown by the farmers near their homesteads. The role of the producers is to collect the cocoons once the adult moths leave the cocoon. The producers ensnare the tree by putting a net to ensure they can find the cocoon once the moths have left. While individual mulberry silkworm moths spin their own cocoon, the wild moths spin in colonies. The resulting cocoon is therefore much bigger in size, but attracts lower prices since more work is required to extract the silk. However, the wild silk, especially from the predominantly indigenous part of the forest, is described as being of higher quality with a longer lifespan(Mbahin, Raina, Kioko, and Mueke, 2012)..

The producers in Kakamega did not have diverse market options for the wild silk. At the time of the interview, the producers received KES.200 (appx. 2USD) for each cocoon. The wild silk is perceived to be of good quality and coarse texture with resulting high quality fabric. According to the producers, the demand is high but the quantity produced is low.

No cultural links exists with the wild silk as, traditionally, the communities around the forest would not engage in catching "*caterpillars*". Caterpillars were seen as a taboo and, therefore, although they are in plenty in the forest, the communities did not exploit them. This could also explain the slow rate of engaging in wild silk production despite having high demand for it.

At least 19 collector/producer groups were identified around Kakamega forest region who engage in various economic activities that benefit from the non-wood forest products, including silk production. Each producer harvests their own silk and later sells through the group, therefore having a limited ability to bargain for better prices – *limited since the producers have only few market options.*

The Kakamega marketplace, established to sell the produce from the farmer groups, was the main marketers of the wild silk. However, once the producers sell the cocoons to the market place, they did not benefit from any value addition done. Silk traders in Nairobi's upmarket were not aware of existence of the wild silk from Kakamega. They mainly purchased wild silk from Pakistan and more recently from Rwanda. The producers of the wild silk were also not aware of the market chain beyond their farms, besides the Kakamega Marketplace. Due to this lack of alternative and aggressive market, the producers do not have an incentive to increase their efforts in looking for the cocoons in the wild. The producers have received support from the *ICIPE* as well as the Sericulture research centre. Kakamega forest service has also made it possible for the producers to access the silk from the forest. However, the groups do not seem to have grown much despite the support (Egelyng et al., 2017).

Pyrethrum as a potential GI

Pyrethrum (*Chrysanthemum cinerariaefolium*) is a perennial crop with a daisy-like appearance and white flowers that possess insecticidal properties (pyrethrins). Pyrethrin is low on mammal toxicity hence safe to use and is not persistent in the environment, making it the oldest insecticide known. Producers often use the dried flowers in pest and disease control in other plants on their farms and on stored grains.

The quality of pyrethrin extracted from pyrethrum is dependent on altitude (upto a maximum of 2900 masl) and temperature. The higher the altitude, the lower the temperatures are and the higher the production of the flowers (Wandahwa and Ranst, 1996). According to the Pyrethrum Directorate, pyrethrum produced in most parts of Kenya has higher pyrethrin content compared to most world

production. Whereas the global average is about 2.0 percent or below, pyrethrin content of 3 percent can been achieved in Kenya. This is attributed to the altitude, and proximity to the equator as well as the characteristics of the soils in the regions (*Verbal communication, Pyrethrum Directorate*). In previous years, export from the Kenyan pyrethrum accounted for up to 90 percent of the global market. Pyrethrum producers in Nakuru County are aware of the quality of their pyrethrum in the world market. However, over time, inefficient institutional patterns in the industry have forced many producers to abandon pyrethrum production in favour of other more profitable enterprises (Monda 2015). Pyrethrum in Molo region in the high altitudes of Nakuru County in the Rift Valley, has high flower productivity as well as the highest pyrethrin content globally.

Currently the pyrethrum directorate of the Agriculture and Food Authority (AFA) oversees the production, marketing and establishing regulations in the Country (GoK, 2013). At the time of the study, the Pyrethrum Directorate was still the main marketer of the crop (Burnett, Farrell, and Kiiru, 2002; Monda, 2014).

Lake Victoria tilapia fish as a potential GI

Whereas captured fish can move from one beach to the other, the geographical characteristics of the regions feeding into Lake Victoria influence the feed available for the fish and consequently the characteristics (taste, size and colour) of the captured fish. The study focused on the landing beaches in Busia County, based on the urban traders' preference for captured fish from the region.

The fishermen (anglers) and traders of captured Tilapia fish from Busia County indicated that the taste of the fish from the Lake varied slightly from one port to another. This was due to the predominant characteristic of the available feed and the Lake bottom. Where there was more rock, hence better algae, and less contamination of incoming waters from rivers, the Tilapia, and fish in general, were tastier. They also indicated that compared to Tilapia from other Lakes and fishponds in the country, those from Lake Victoria are tastier. They attributed this mainly to the quality of water flowing to the lake and the characteristics of both the soils and rock bed. There is need for further research to ascertain the source of these perceptions and differences.

Among the traders and consumers in Nairobi, once fish is cooked, most consumers are not able to distinguish their physical characteristics. The taste is, therefore, the main selling point of the fish. Although the price will not vary, consumers will frequent eating-places they perceive to have tastier fish. According to the anglers and traders at the beach, prices are mainly set by the urban centre markets, especially those in Nairobi. This in turn has implication on the prices at the local fish market, as the traders will often sell to the highest bidder. Therefore, although the local market is characterised by minimal transport costs and value addition, prices are relatively high and comparable to the prices in the urban the tilapia is quite costly at the local market. These

perceptions agree with findings by Akande and Diei-Ouadi (2010) that fish prices are based on marketability and not on quality.

Fishing in Lake Victoria is organised in beaches managed by community-elected beach management units in collaboration with the State Department of Fisheries. Capturing is done by fishermen, either using their own boats or on contract with boat owners. At the beach, the anglers sell the fish to traders who in turn sell it to transporters who then ferry the fish to major urban centres. The government has imposed restrictions to the export of Tilapia fish due to low volumes and high demand.

Due to the high demand for Tilapia, where rules are not enforced, anglers have been known to use smaller-than-recommended nets that catch very young tilapia, hence endangering the survival of the breed. In addition, key informants indicated that most of the beaches in Busia serve as breeding grounds for Tilapia fish. Fishing near these breeding grounds therefore endangers the survival of the Tilapia is endangered.

In terms of cultural linkages, fish has traditionally constituted a major part of the diets of the communities living around Lake Victoria. According to the focused group discussions held, consumption of fish is associated with child brain development.

Koriema goats as a potential GI

The term "Koriema goats" is widely used to refer to goats grown in a specific zone in Baringo County, in the Central Rift of Kenya. Goats from Baringo County generally attract higher prices among consumers and traders. Interviews with traders at common goat meat-roasting sites in nearby urban centres indicated that they hardly source goats from Baringo since they are priced higher compared to those sourced from the southern parts of the Rift Valley. Consumers interviewed indicated that Baringo goat has a unique natural salty taste that endears it to many. Some consumers travel all the way to Baringo to purchase the meat. A spot-check also reveals a number of butcheries named using the name "Koriema". This has implications on the use of the name to register the potential GI.

The producers in Baringo County were aware of the "naturally salty" characteristic of the goats found in the specific belt. They attributed this to the salt deposits visible in the region and the resultant bitter herbs and pods of acacia trees on which the goats browse and feed on. The goats graze freely (without a herdsman). That way they are able to browse on a wide selection of herbs and shrubs and lick from the salt deposits along the belt. The producers at the focused group discussions indicated that these consumption habits and sources were the source of the goat meat quality. Unique ear notching identifies the clan and family of the goat owner, and serves as security for the goats as they browse freely. In addition, the goats rarely require veterinary treatment since the herbs make them

immune to various diseases and infestations. Further, the producers perceive the goat meat and bone soup to be medicinal to human beings.

The producers indicated that the salt licks do not diminish. However, due to tree felling for charcoal burning and fuelwood, erosion has become rampant resulting in gulley formation in the region. This has affected the presence of the useful shrubs and herbs in the region. In addition, increased land subdivision is also posing a threat to the sustainability of the free browsing system. Currently, communal ownership is the main land tenure system especially for grazing land. Increasingly, there is evidence of land-subdivision and sale of land, especially to people from outside the region.

To the women, the goats serve as a source of seeds for important trees. Once they graze in the wild, they drop seeds in the homestead, which can be washed and used for oil extraction, or planted hence ensuring tree cover in the region.

In Baringo, Koriema goats have a strong cultural linkage to the community activities. According to the then chief of Kimalel location in Marigat sub-location, Koriema means "*meeting*". He adds "In the 19th century, Koriema was the place where elders met to form clans, perform circumcisions and other important meetings. They always sealed the meeting with Koriema meat".

The community consume the goat meat, blood and milk mixed with natural herbs, which were also important items for their ceremonial events. With increased awareness, however, the producers indicated that the consumption of blood is on the decline. They consider goats sacred and therefore do not use them in ceremonies associated with averting curses and omens.

During slaughter, there are specific old men who had to be present to foretell the future by feeling the texture of the goats' offal. The "prophecy" could be on an individual family, community or nation at large. However, the elderly community expressed concern that the younger generation is detached from most of these cultural linkages.

The markets at location level as well as the Sub-county levels form the main sale points for live goat trade in Baringo County. Informal abattoirs in the County supply the goat meat butcheries in the County. Traders purchase the goats either at the farm gate or the market where the producers take their goats and negotiate for prices. Goats from Baringo rarely access the export market. According to the Kenya Meat Commission, consumers in the United Arab Emirates, the main export market, prefer goats that are less than 1.5 years old. On the contrary, producers in Baringo do not sell young goats, as goats are a sign of wealth.

Collective action in production was mainly through allowing the goats to browse in the communal land together. During sale of the goats, there is a generally

agreed upon price per kilogram upon which both the traders and producers base their bargain. This is usually set with the help of the State department of livestock production at the sub-county level. There are no restrictions in the trade, as long as the buyers and sellers adhere to safety standards. However, during the peak selling periods listed above, e.g. early in the year, when most producers are selling goats to raise school fees for their children, they are often prone to exploitation by the buyers due to the desperation of the moment. With the exception of the goats sold to local abattoirs, the goat producers are often not aware of where the buyers sell the live goats they buy.

Baobab from lower Eastern Kenya as a potential GI

Referred to as the "upside-down tree" due to its hugely swollen tree trunk and stiff bare branches that resemble roots, Baobab tree occurs naturally in the coastal and the semi-arid regions of the lowland eastern regions of Kenya. The nutritive quality of the tree and its products is higher than that found in most other fruits and sources of similar nutrients (Maundu and Tengnas, 2005). In Kenya, Baobab tree is regarded as an underutilised tree with few community members recognising its health and nutrition benefits (*KEFRI, verbal communication;* Mbora et al., 2008).

According to the Kenya Forestry Research Institute (KEFRI), the baobab tree is a very useful but highly unexploited tree in the semi-arid regions of Kenya. Occurring near the equator, the tree has high nutritional value in its seeds, fruits and leaves. The products of the baobab tree in Kenya is perceived to have higher nutritional properties compared to those from other regions, since it occurs closest to the equator compared to other countries where it is produced. However, there lacks documentation on the same and majority of the buyers who sell to the international market remain largely unknown. Currently, the most common use in Kenya is consumption of the fruit and pulp-coated seeds (mabuyu).

According to informal sources, the Kamba elders often met under the Baobab tree. Due to the longevity of the tree, the elders regarded it as a fellow "elder", hence appropriate place for meeting since it often outlived most of the community members. Further, during times of long treks, travellers through the region sheltered under the baobab tree and drank water collected in the clefts of the larger branches. According to Sidibe and Williams (2002), Baobab tree is able to withstand the two major hazards of dry/semi-arid areas, namely fire and drought. The tree trunk shrinks during dry seasons and expands in wet seasons, while its thick bark is fire-resistant able to regenerate after a fire.

According to literature, all parts of the Baobab tree are useful. Market exists for the products especially due to the role in food security. However, the figures on the actual scope of the market for baobab are scanty and not readily available. The study could not immediately determine whether there exists market linked to the specificity of the baobab grown in Kenya.

Various organisations have invested in popularising the tree and its products among locals as well as the urban market. These include government and international research bodies as well as the State department of Agriculture.

Coastal oranges as a potential GI

The survey focused on oranges from the coastal region, specifically Kwale (Msambweni, slopes of Shimba hills) and Mombasa as well as the lower eastern region. Oranges and other fruits produced in the region are generally sweet. Citrus fruits are good agro-forestry trees, providing useful shade on the farm when pruned. They are a source of income in areas where other food crops may not perform well. At the time of the survey, most producers had Minneola and Pixie citrus varieties, both imported from Israel. Mineola citrus are sweet, juicy and large, though having a shorter shelf life than Pixie, which lasts for at least 4 months. The producers indicated that the climate around Shimba hills (i.e. warm temperature, adequate rainfall) coupled with the sandy loam soils makes the region favourable for fruit production. Due to high perishability, the prices received for the oranges are not different from those they receive for the other oranges. Further, the study established that the Voi oranges are sweet and unique due to production practices and not necessarily due to the geographical area of production.

The Horticultural Crops Development directorate of the AFA and the Kenya Plant Health Inspectorate Service (KEPHIS) have provided the guidelines to enable certification of the fruits for sale. Other standards exist, including the good agricultural practices (GAP). However, when producing for local market, the producers often do not strictly adhere to these standards. The HCD directorate has facilitated registration of nurseries for fruit trees at the rate of KES.500/year (at the time of the survey), while the Kenya Agriculture and Livestock Research Organisation have ensured availability of planting materials through their seedling multiplying programs. This ensures availability of clean planting material for establishment of the fruit orchards.

Although the State department of Agriculture over time has encouraged collective action among producers, the short shelf life of the citrus has often made producers succumb to lower-than-set prices offered by buyers. High poverty levels further complicate the bargaining power, as producers opt to receive immediate lower prices hence going against laid down collective agreements.

Different markets exist for different varieties of citrus fruits. The buyers at the Kongowea Fruit Market in Mombasa prefer the normal traditional orange varieties, while the Asian market prefers the Minneola provided that good agricultural practices (GAP) and good handling practices (GHP) are met. This means that the citrus fruits have high juice content and are transported using crates and not gunny bags. The producers however, lack the volumes to sell directly and consistently to greengrocers and processors. The low volumes also

mean that they are unable to invest in purchasing the crates and hence have to rely on the intermediaries to access the markets. The traders come with trucks from urban centres including Nairobi, Mombasa and as far as Kisumu.

Avocadoes from Murang'a as potential GIs

According to the Horticultural Crops Development (HCD) directorate, there is a link between oil content of avocado and the area of production. In Kenya, Kakuzi has identified Muranga and Kisumu as regions that produce avocadoes with highest oil content. The regional characteristics that contribute to this include the heat units (sunshine hours the avocado trees receive in each season) in the region as well as the well-drained soils. The altitude of a region also influences pest and disease incidences. Therefore, grown in the right regions, avocadoes from the country tended to exhibit higher oil content compared to those from other countries (*personal communication, HCD*). For example, avocado from Murang'a have higher oil content and less incidences of pests and diseases. The production season is also off-season to most other production regions within and outside the country, providing an opportunity for better prices.

Traditionally, farmers practiced avocado production individually, often without any specific link to the market. Over time, with increased demand for the fruit both in the domestic and export markets, there has been an increase in production for the market. Producers market their produce either as groups/collectively or individually to processing and exporting firms like Kakuzi, Vegpro, Sunripe e.t.c. or brokers in the industry. The farmers sign contracts with the companies, who then offer technical capacity building and in return, the producers have a ready market for their harvest. Small-scale producers of avocadoes attribute the quality more to management practices as well as temperature and sun hours, as trained by the supporting institutions like Kakuzi Limited.

The major challenge for exports from Kenya has been certification. However, increased surveillance and management of the farms, and linkages with exporters, has resulted in better quality of the fruits in terms of the size of fruit as well as the oil content. During the interviews, there was consensus that there could be a link between the quality of the fruits and a combination of variety and geographical region of production.

Market demand has resulted in production of more exotic varieties (especially Hass and Fuerte) as opposed to the initial local ones. The local fruits, produced by at least 70 percent of avocado producers, are smaller and exhibit lower oil content (World Economic Forum 2014). However, according to HCDA, there are markets, both local and export, that prefer the smaller-sized varieties, hence providing an opportunity to exploit. New processing factories and markets have been established to capture these quotas.

The Horticultural Crops Development directorate of the AFA and the Kenya Plant Health Inspectorate Service (KEPHIS) have provided the guidelines to enable certification of the fruits for sale. The HCD directorate has facilitated registration of nurseries for fruit trees at the rate of KES.500/year (at the time of the survey), while the Kenya Agriculture and Livestock Research Organisation (KALRO) have ensured availability of planting materials through their seedling multiplying programs.

Summary of Products Identified As Potential GIs

The description above indicates that each of the eleven (11) products identified during the scoping study had unique aspects that provided a niche in the market. Initial selection was based on its reputation and uniqueness perceived to have a link to the region of production. Only Koriema goats, baobab tree, Ngowe mango and tilapia appeared to have varying cultural links to the communities. Each of the products has potential to contribute to environmental sustainability, and part of their uniqueness is a result of the complex environmental constituents and their interactions in the different agro-ecosystems of their production.

With the exception of wild silk, goats and baobab tree, the other plants reviewed were introduced into the country within the last two centuries and, over time, adapted to different climatic conditions. Collective action was evident in tea and coffee, mainly guided by regulations in the industry. The other products had varying but inconsistent levels of collective action, which influenced the producers' access to the markets. All the products have macro-institutions that provide guidelines related to production and marketing, and could provide support if further product differentiation were explored. Producers' awareness of the uniqueness of the product as well as the implication of the same on market price varied.

Overall, Tea, Koriema goats, Coffee, Tilapia fish and Makueni Apple mangoes were ranked as the five highest products with potential of linking their uniqueness to the geographical region of production as well as the market characteristics (Table 2).

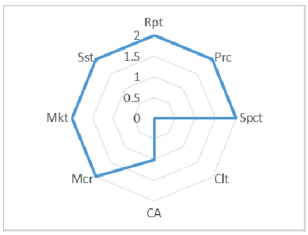
Table 1: : Scoring of products identified as potential GI against identified criteria

Criteria	Score for each product (out of 16)										
	Tea	**Coffee**	**A. Mango**	**N. Mango**	**Wild silk**	**Pyrethrum**	**Tilapia**	**Koriema goats**	**Baobab**	**Oranges**	**Avocado**
1. Reputation (**2**)	2	2	2	1	1	2	2	2	2	2	1.5
2. Specificity/Uniqueness (**2**)	2	2	2	2	2	1	2	2	1	1	1
3. Environmental impact and sustainability (**2**)	1.5	1	2	1	2	2	0.5	1.5	2	1.5	1.5
4. Cultural aspects/linkages (1)	0	0	0	0.5	0	0	1	1	0.5	0	0
5. Premium price (**2**)	2	2	0.5	0.5	0.5	0.5	0.5	2	0.5	1	0.5
6. Collective action and coord institutions (**2**)	1	1	0.5	0.5	1.5	0.5	1.5	1	0.5	0.5	1
7. Macro organisational and institutional support (**2**)	2	2	1	1	1.5	0.5	1.5	1	1	2	2
8. Market attractiveness, supply chain & scope of market (3)	2	1.5	2	2	1	2	1.5	1.5	1	1	1
TOTAL SCORE (16)	**12.5**	**11.5**	**10**	**8.5**	**9.5**	**8.5**	**10.5**	**12**	**8.5**	**9**	**8.5**
RANK (1 = highest score)	**1**	**3**	**5**	**8**	**6**	**8**	**4**	**2**	**8**	**7**	**8**

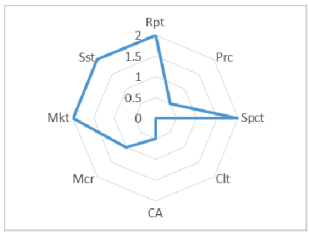
Table 2: Ranking of products using weighted average

		Weighted Score for each product										
Criteria	**Criteria weight**	**Tea**	**Coffee**	**A. Mango**	**N. Mango**	**Wild silk**	**Pyrethrum**	**Tilapia**	**Koriema goats**	**Baobab**	**Oranges**	**Avocado**
1. Reputation (**2**)	2	4	4	4	2	2	4	4	4	4	4	3
2. Specificity/Uniqueness (**2**)	2	4	4	4	4	4	2	4	4	2	2	2
3. Environmental impact and sustainability (**2**)	2	3	2	4	2	4	4	1	3	4	3	3
4. Cultural aspects/linkages (1)	2	0	0	0	1	0	0	2	2	1	0	0
5. Premium price (**2**)	1	2	2	0.5	0.5	0.5	0.5	0.5	2	0.5	1	0.5
6. Collective action and institutions (**2**)	1	1	1	0.5	0.5	1.5	0.5	1.5	1	0.5	0.5	1
7. Macro institutions recognition and support (**2**)	1	2	2	1	1	1.5	0.5	1.5	1	1	2	2
8. Market attractiveness and scope of market (3)	1	2	2	2	2	1	2	1.5	1.5	1	1	1
Weighted average (*Total weighted score/total weight*)		**1.5**	**1**	**1.3**	**1.1**	**1.2**	**1.1**	**1.33**	**1.5**	**1.2**	**1.1**	**1**
RANK (1 = highest score)		**2**	**3**	**4**	**10**	**6**	**8**	**4**	**1**	**7**	**8**	**11**

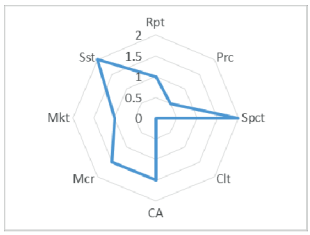
Charts showing summary of scoring criteria for each of potential GI products characterised (*Key at the end of the charts)*



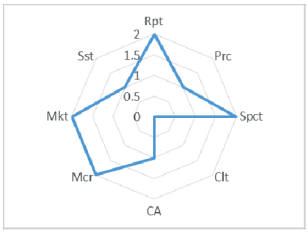
Tea production



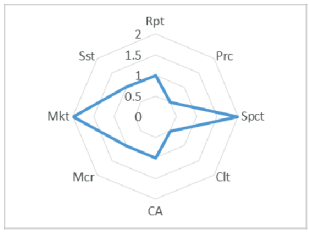
Apple Mango



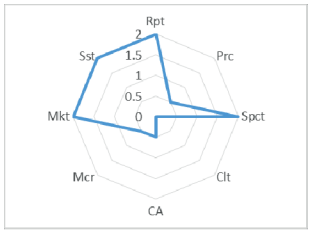
Wild Silk



Coffee production



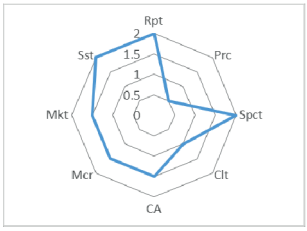
Ngowe mango



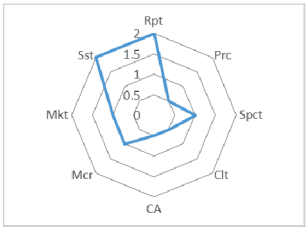
Pyrethrum

Koriema Goats

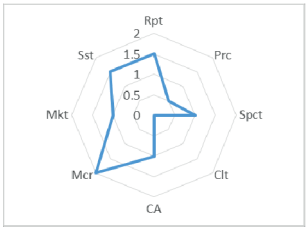
Oranges



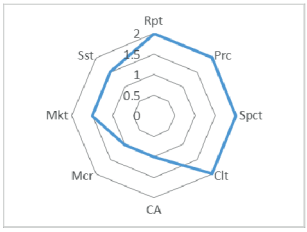
Tilapia Fish

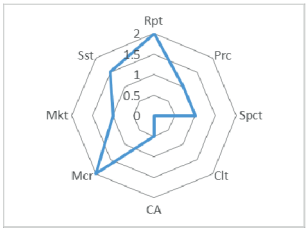


Baobab



Avocado





Key: Rpt=Reputation, **Prc=**Premium price, **Spct=**Specificity/Uniqueness, **Clt=**Cultural aspects/linkages, **CA=**Collective action and institutions, **Mcr=**Macro institutions recognition and support, **Mkt=**Market attractiveness and scope of market, **Sst=**Environmental impact and sustainability

Conclusions

The study focused on applying a range of criteria as a basis to select agri-food products for further assessment on their characteristics and potential to register them with geographical indications. The criteria were developed to identify products that have potential linkages to geographical regions (endogenous factors) and with exogenous factors relating to markets, institutions, among others, which could facilitate or hinder development of the products as geographical indications. A case in point is the Kakamega silk, which does not currently have a stable market, and hence is not fully exploited. It is possible to invest in establishing a market based on the link to the geographical region. However, Giovannucci et al (2009) advice that care be taken, as this can be a costly affair that results in losses to producers, hence jeopardising the current efforts.

The study concludes that the GI potential of a product cannot be identified using any one indicator alone. A combination of attributes is required as it helps identify different aspects that would require attention in developing the potential GI, agreeing with Barjolle and Sylvander (2002). With the growing interest in GI protection in Kenya, this study and other similar ones contribute to the literature and basis for further exploitation of the differentiation opportunity.

Through literature, applicable tools are developed for the assessment of GI potential products. Whereas some products have reputation and uniqueness, other factors including collective action, existence of macro institution recognition and support may not be in place, making it harder to develop them as GIs. Our application of the selection criteria in this scoping study, however, provided a quick and replicable approach to identify potential GI products for further analysis.

The analysis points to the relevance of future research on the quality of origin products and institutional regimes for geographical indications in Kenya. It also highlights the importance of distributional issues. These are the conditions under which and extent to which local producer alliances can be enabled or empowered (or empower themselves) to gain awareness of the factors constituting the unique qualities of their origin products and gain a higher share of the price premiums created through product reputation based on these qualities.

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